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Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property

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Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property

Leslie S. Potter* and Bruce Zagaris**

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I. INTRODUCTION

The cultural property¹ of a nation stands as a testament to the origins of its civilization, providing an education to its peoples and a focal point for national unity. For these reasons, objects and works within the ambit of cultural property are tremendously significant to a culturally rich but economically poor source nation.² However, a competing interest exists in the form of comparatively art poor, but economically wealthy market nations which actively seek the acquisition of cultural property. The resulting conflict is best exemplified by Mexico and the United States, neighboring countries that squarely fit within the source and market nation scheme.³ The typical difficulties in retention of cultural property by a source nation and control of imports by a market nation are exacerbated when the states share a common border, like Mexico and the United States. The long common border facilitates the flow of illicit trade.⁴

1. The broad term "cultural property" includes objects of artistic, archaeological, historical or ethnological interest. See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289 [hereinafter UNESCO Convention] (providing a comprehensive definition of cultural property).

2. John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 832 (1986).

3. The U.S. is actually both a market and a source country. *Id.* at 832, n.4.

4. No other nations become involved in the transport of cultural property by geographic necessity.

In the 1970s, the international community began to enact legislation in an attempt to stem the ever-increasing traffic in stolen and illegally exported cultural objects. Restrictions on export and import have taken the form of multilateral and bilateral treaties, as well as domestic legislation. U.S. courts have applied civil and criminal judicial remedies to combat the flow of illicit trade. Non-governmental organizations have pledged their support for an untainted cultural market through promulgation of resolutions.⁵ Individual museums and institutions have drafted ethical acquisition policies in recognition of the need for self-regulation.⁶

Two schools of thought exist regarding the trade in cultural property: internationalism and nationalism. Internationalists view cultural property as the heritage of a common human culture, irrespective of national location or jurisdiction.⁷ Therefore, they support the legal exchange of cultural property between states, particularly if a source nation cannot provide the necessary protection and preservation of such objects. In contrast, nationalists view cultural property as the basis of a national cultural heritage and place great importance upon an object's physical location within the country of origin. Correspondingly, nationalists support export restrictions, the recovery and repatriation of illegally exported and stolen objects, and national ownership claims of all works deemed cultural property.⁸ Lesser developed, art rich nations tend to adhere to the nationalist view by legal declarations that all antiquity objects⁹ are the property of the state and by the adoption of strict regulations over the export of such objects.¹⁰ As will be examined later, with respect to cultural property originating in Mexico, Mexico favors a

5. The most prominent of these resolutions is the International Council of Museums (ICOM) statutes.

6. See, e.g., *The Pennsylvania Declaration Decision of Curators of the University Museum*, UNIVERSITY OF PENNSYLVANIA (April 1, 1970); *THE HARVARD REPORT* (November 29, 1971).

7. Merryman, *supra* note 2, at 831. See L. PROTT AND P. O'KEEFE, *NATIONAL LEGAL CONTROL OF ILICIT TRAFFIC IN CULTURAL PROPERTY* (UNESCO) (1983); and Halina Niec, *Legislative Models of Protection of Cultural Property*, 27 *HASTINGS L.J.* 1089 (1976).

8. Merryman, *supra* note 2, at 832.

9. Antiquity objects are those which are at least 200 years old.

10. L. Wardlaw Hamilton, *Museum Acquisitions: The Case for Self-Regulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 347, 348 (Leonard D. DuBoff ed., 1975).

nationalist approach in its exports, and the U.S. supports this nationalist view in its monitoring of imports.¹¹ Although Mexico has historically maintained its position, the U.S. has altered its approach in recent decades.¹²

This article discusses contemporary policy and law enforcement efforts of both the U.S. and Mexico regarding cultural property. A primary emphasis is placed on the recovery and return of stolen or illegally exported Mexican cultural objects brought into the U.S.¹³ The nationalist orientation and the emphasis on recovery and return of its cultural property is illustrated by the refusal of the Government of Mexico to return a Mayan Codex stolen in 1982 from the Bibliotheque Nationale in Paris by a Mexican lawyer. The Mexican Government claimed the Codex was stolen from Mexico in the 19th century.¹⁴ This article examines the nature and extent of illicit trade between the U.S. and Mexico, as well as the difficulties with the current enforcement structure and prospects for remedies. U.S.-Mexican initiatives are compared and contrasted with those of other source and market nations, such as Peru and the European Community countries. Finally, the prospective North American Free Trade Agreement (NAFTA)¹⁵ and the other economic integration efforts are discussed with a view towards their potential influence upon the prevention and remedy of illegal trade in cultural property.

This article concludes that economic integration objectives may in the future promote a shift in cultural trade policy toward a

11. Merryman, *supra* note 2, at 850. The U.S. and Canada are the most strongly committed, both in word and action, of all cultural property market nations, to the enforcement of other nations' retentive laws and policies. *Id.* at 851. See John H. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757 (1983).

12. Merryman, *supra* note 2, at 850-51. The change in U.S. policy began with the enactment of the U.S.-Mexico Treaty of Cooperation, the Pre-Columbian Act of 1972, and the Senate's advice and consent to the ratification of the UNESCO Convention. SHARON A. WILLIAMS, *THE INTERNATIONAL AND NATIONAL PROTECTION OF MOVABLE CULTURAL PROPERTY* 133-34 (1978).

13. Although in recent years the United States has encountered a problem with stolen Native American artifacts, Mexico has not been a market for these items. Rather, other market nations such as Germany, Japan and Switzerland are the destination for Native American objects. Therefore, this article will not explore the problem.

14. See Alan Riding, *Between France and Mexico, a Cultural Crisis*, INT'L HERALD TRIB., Aug. 31, 1982, at 1 (providing background on the incident).

15. NAFTA, available in WESTLAW, NAFTA database. NAFTA has been signed and is awaiting ratification by all three signatories as of this article's publication date.

“regionalist,” if not internationalist, perspective. In any event, increased movement of persons, products and capital will facilitate trade in illicitly obtained cultural property.

To properly safeguard the integrity of cultural property, member states of NAFTA and other economic integration groups will need to review and improve the measures to detect and prevent illegal movement and to facilitate the recovery and return of such property. Further, they will need to achieve remedies sufficient to discourage the illicit movement of cultural property, including the prosecution and punishment of persons who participate in criminal activity relating to the theft of cultural property; and assist in the compensation of victims in the illicit movement of cultural property. The NAFTA member states will also need to establish and develop an infrastructure and institutional mechanisms to monitor and ensure that laws and policies to enforce the liberalized regime are properly implemented and fulfilled.

A. Trafficking in Stolen Cultural Property

The discussion of law enforcement mechanisms to prevent and punish illicit trade in cultural artifacts requires background consideration of the types of property and traffic that are involved.

1. Types of Property

A precise definition of “cultural property” is difficult because great variance exists in the descriptions of culturally significant objects among national legislation and treaties. For instance, Japan’s definition of cultural property is novel in that it includes *people* with artistic talent,¹⁶ such as Kabuki dancers and carvers. The UNESCO Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Article 1, defines cultural property as that “which, on religious and secular grounds, is specifically designated by each State as being of importance for

16. Dan F. Henderson, *The Japanese System for Controlling Art Movement*, in *ART LAW: DOMESTIC AND INTERNATIONAL*, *supra* note 10, at 263, 264.

archaeology, prehistory, history, literature, art or science,” and presents the most comprehensive list of categories.¹⁷ The United States and Mexico are both signatories to the UNESCO Convention,¹⁸ and therefore accept its definition of cultural property.

The 1972 Cultural Protection Act, Mexico’s applicable legislation on the subject, categorizes protected Mexican cultural objects into three areas: archaeological monuments, artistic monuments and historical monuments. Archaeological monuments include “movable and immovable objects (which are) products of the cultures prior to the establishment of the Spanish culture in the National Territory, as well as human remains, and fauna, related to these cultures. . . .”¹⁹ Cultural materials are given a unique status in that they are declared property of the nation, regardless of whether the government has reduced the monuments to possession.²⁰ In other words, the Mexican government owns all archaeological monument property, even if it is sold or not yet discovered. This notion closely parallels the American law concept of “treasure trove.”²¹ Artistic monuments encompass “works of outstanding aesthetic value,” but they do not include the work of living artists, with the exception of murals.²² “Properties relating to the history of the nation from the time of the establishment of Spanish culture in the country” are considered historical monuments, if determined as such by the either the President or the Ministry of Public Education.²³

17. UNESCO Convention, *supra* note 1, art. 1. The treaty was ratified by the United States in 1983.

18. Both nations have ratified the Convention, with the United States’ ratification being subject to reservations. See *infra* note 102 and accompanying text.

19. *Ley federal sobre monumentos y zonas arqueológicos, artísticos, e históricos*, May 6, 1972, art. 28, 312 D.O. 16 (Mex.). [hereinafter Mexican 1972 Cultural Protection Act], quoted in Niec, *supra* note 7, at 1110.

20. Mexican 1972 Cultural Protection Act, *supra* note 19, art. 27, quoted in Niec, *supra* note 7, at 1110.

21. Barbara B. Rosencrance, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT’L L.J. 311, 328 (1986).

22. Mexican 1972 Cultural Protection Act, *supra* note 19, art. 33 quoted in Niec, *supra* note 7, at 1110.

23. Mexican 1972 Cultural Property Act, arts. 5, 32, quoted in Niec, *supra* note 7, at 1110.

The United States has delineated a definition of Mexican cultural property in need of protection through the Pre-Columbian Act of 1972.²⁴ Stone carvings, wall art or fragments thereof that are the product of a pre-Columbian Indian culture are protected.²⁵ A definition of cultural property, indigenous to the United States, is provided by the Archaeological Resources Protection Act of 1979.²⁶

2. Types of Trafficking

The illegal cultural property market has developed into a "billion dollar" trade,²⁷ increasingly supplied with artifacts pillaged from archaeological sites. A few years ago, art thievery was estimated to be the second biggest international criminal activity after narcotics. The value of worldwide art theft and fraud was estimated to be at least \$1 billion annually.²⁸ The situation is particularly acute in Mexico, where the looting and destruction of Mayan sites for pre-Columbian antiquities has reached crisis proportions.²⁹ The sheer number of objects, their desirability on the market, their inaccessible location in jungle lowlands, and the unavailability of adequate funding for enforcement efforts complicate effective law enforcement in Mexico.³⁰

24. Regulation of Importation of Pre-Columbian Monumental or Architectural Sculpture or Murals (Pre-Columbian Act), Pub. L. No. 92-587, 86 Stat. 1297 (1972) (codified at 19 U.S.C. §§ 2091-2095 (Supp. II, 1972)).

25. *Id.* § 2095(3)(A).

26. The Archaeological Resources Protection Act, Pub. L. No. 96-95, §§ 2-13, 93 Stat. 721 (1979) (codified at 16 U.S.C. §§ 470aa-11. (1985)) [hereinafter ARPA]. Archaeological resources are defined as "material remains of past human life or activities which are of archaeological interest." This includes "pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece thereof." *Id.* § 470bb(1).

27. Richard Upton, *Art Theft: National Stolen Property Act Applied to Nationalized Mexican Pre-Columbian Artifacts*; *U.S. v. McClain*, 10 J. INT'L L. & POL'Y 569 (1978).

28. Sydney M. Drum, Comment, *Deeweerth v. Baldinger: Making New York a Haven for Stolen Art?* 64 N.Y.U. L. REV. 909 (1989).

29. The U.S., as the primary destination for Mayan works, has responded by enacting legislation directed specifically at the import of pre-Columbian monumental or architectural sculpture or murals. See 19 U.S.C. §§ 2091-2095; *infra* notes 117-120 and accompanying text.

30. Marlene Alva Gonzalez, *New Legal Tools to Curb the Illicit Traffic in Pre-Columbian Antiquities*, 12 COLUM J. TRANSNAT'L L. 316 (1973).

Criminal dealers and collectors employ “huaqueros”³¹ for the purpose of illegally and surreptitiously removing the objects from their jungle archaeological sites. The architectural remnants of the Mayan civilization are reached by boat, helicopter, or mule.³² Professional looters employ portable generators, prefabricated huts, earthmoving and excavation equipment, power tools and metal detectors. The financial resources, sophistication and brutality of professional looters are legendary—they have even built landing systems in the jungles of Central America and used old DC-3 cargo planes to remove artifacts.³³ Mayan stelae comprise a large share of the works stolen.³⁴ The thieves hack the stelae into smaller, more manageable pieces with a power saw or a crude tool in order to transport them.³⁵ The huaqueros visit physical damage upon both the site and the object removed in the course of their hurried excavation of the artifacts. Often the cultural significance of a work is lost by its removal and subsequent anonymity on the market. Out of the context of its archaeological site, a fragment or portion of a Mayan hieroglyph possesses negligible meaning as a historical record. Portions of artifacts are shipped in crates deceptively labelled as “personal effects,”³⁶ and are either sold in their fragmented state or reassembled upon reaching the United States. Occasionally, police and customs officials who have received compensation in exchange for their complicity in the crime assist in the export of the works.³⁷

31. Huaquero is a Peruvian word which describes tomb plunderers and archaeological looters. See KARL E. MEYER, *THE PLUNDERED PAST* 132 (1973).

32. Gonzalez, *supra* note 30, at 318; Robert Reinhold, *Traffic in Maya Art is Diverse and Profitable*, N.Y. TIMES, Mar. 27, 1973, at 1.

33. Ron Yates, *Treasures of the Maya*, reprinted in CONVENTION ON CULTURAL PROPERTY IMPLEMENTATION ACT: HEARINGS ON H.R. 5643 AND S. 2261 BEFORE THE SUBCOM. ON INT'L TRADE OF THE SENATE COMM. ON FINANCE, 95th Cong., 2d Sess. 25 (1978) [hereinafter 1978 Senate Hearings].

34. Stelae are free-standing, commemorative monuments erected in front of pyramids or temples. They are made of limestone and are carved with figures of priests, rulers, monsters, and hieroglyphics. Stelae measure up to twenty feet and weigh up to several tons. William D. Rogers and Rosalind C. Cohen, *Art Pillage: International Solutions*, in ART LAW: DOMESTIC AND INTERNATIONAL, *supra* note 10, at 315; WILLIAMS, *supra* note 12, at 113.

35. Rogers and Cohen, *supra* note 34.

36. See U.S. v. Hollinshead, 495 F.2d 1154, 1155 (9th Cir. 1974).

37. Merryman, *supra* note 2, at 848-49.

Costs of illegal excavations vary tremendously, but a large-scale excavation requires financing by interests in Europe or North America.³⁸ Some thefts are commissioned on a made-to-order basis, in which collectors or dealers place an order with local "archaeologists."³⁹ The hierarchy of those involved in the business ascends from local peasants and farmers in need of money, and corrupt government and customs officials, to wealthy private art collectors, art dealers, and museums and institutions.⁴⁰

In the face of the tremendous market demand for their cultural artifacts, the source countries have difficulty preventing looting. Physical protection of thousands of remote sites is expensive and in some cases not feasible.⁴¹ "Police, customs agencies and other enforcement agencies are understaffed and woefully underpaid. [S]ome of the most damaging looting occurs in previously unknown sites, such as Oxhintok, which are not discovered until it is too late."⁴²

II. TREATIES

One of the principal mechanisms of international enforcement against illicit trade in cultural artifacts has been treaties, both bilateral and multilateral.

Because they can be tailored to address a specific problem between two nations, bilateral treaties provide an effective means by which a country can recover its stolen property. However, such bilateral arrangements have been criticized because they are simply a "bargaining chip" for a country with a larger foreign policy agenda.⁴³ A country's ulterior motives in entering into a bilateral

38. Lawrence J. Persick, *The Continuing Development of United States Policy Concerning the International Movement of Cultural Property*, 4 DICK. J. INT'L L. 89, 91 (1985).

39. *Id.*

40. *Id.*

41. 1978 Senate Hearings, *supra* note 33, at 25.

42. Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 469-70 (1988).

43. *Hearings on H.R. 3403 Before the Subcomm. on Trade of the Comm. on Ways and Means*, 96th Cong., 1st Sess. 48-54 (1979) (statement of Andre Emmerich, American Association of Dealers in Ancient, Oriental, and Primitive Art), *cited in* Persick, *supra* note 38, at 101 n.110.

agreement may bear upon a commitment to enforcement of its obligations. Most nations, however, would benefit by diligently effectuating treaty responsibilities in order to foster future cooperation in their larger objectives. An issue that will be discussed later is whether, in the context of regional integration, bilateral agreements should be supplemented by regional institutional mechanisms.

A. *Bilateral*

1. *Between the United States and Mexico*

In response to large losses of cultural property from Mexican archaeological sites, Mexico and the United States signed the Treaty of Cooperation Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties on July 17, 1970.⁴⁴ The treaty provides bilateral control and mutual cooperation in the international traffic of cultural property,⁴⁵ while recognizing the importance of cultural exchange.⁴⁶

The 1970 treaty is narrow in scope, applying only to a few types of objects and covering only stolen property. Only government owned property falls within the scope of the definition; privately owned property is not affected.⁴⁷ Under Article I, applicability of the definitions to an object is determined by agreement between the governments or an appointed panel of experts. Their decision is final.⁴⁸ However, the most critically endangered group of cultural property, pre-Columbian artifacts, is specifically covered. Article I of the treaty defines archaeological, historical and cultural properties. Under the treaty, archaeological, historical and cultural properties include pre-Columbian and colonial materials "of outstanding

44. Treaty of Cooperation between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, July 17, 1970, U.S.-Mexico, 22 U.S.T. 494, T.I.A.S. No. 7088 [hereinafter U.S.-Mexico Treaty]. The treaty was ratified by the U.S. Senate on February 10, 1971.

45. Gonzalez, *supra* note 30, at 320.

46. *Id.*, at 322; U.S.- Mexico Treaty, *supra* note 44, art. II(1).

47. Gonzalez, *supra* note 30, at 321.

48. U.S.- Mexico Treaty, *supra* note 44, art. I(2).

importance to the national patrimony," as well as pre-1920 official archive documents.⁴⁹

Article II discusses the primary goals the treaty is intended to achieve. Articles III through V specify the means and procedures by which the two nations shall undertake return of stolen cultural property. The claimant party must make a request, through diplomatic offices and at its own expense, accompanied by evidence sufficient to support a claim.⁵⁰ The requested party's Attorney General possesses the authority to institute a civil action in district court if other legal means of facilitating the objects' return are unavailable.⁵¹ District court jurisdiction of the United States is based upon 28 U.S.C. § 1345.⁵² Each nation's existing domestic law is unaffected by the treaty provisions. The agreement does not alter the existing national cultural property import laws, nor does it empower law enforcement authorities to take seizure and recovery actions in reliance upon a foreign government's laws.⁵³

A requesting nation bears all incidental recovery expenses in the return of property,⁵⁴ and may not claim compensation against the requested party for loss or damage during return of the property in compliance with treaty obligations.⁵⁵ Neither party may impose a charge or penalty relating to domestic merchandise importation.⁵⁶

Although the states express their intent to foster legitimate excavation, study, exhibition and trade of cultural property, the substantive emphasis of the treaty centers on the return of property to its country of origin. The treaty's primary contribution is to the

49. U.S.-Mexico Treaty, art. I(a)-(c).

50. *Id.* art. II(2).

51. *Id.* art. III(3).

52. Gonzalez, *supra* note 30 at 321-322. The language of 28 U.S.C. § 1345 provides: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

53. *A Bill to Amend the National Stolen Property Act, Relating to Stolen Archaeological Property, 1985: Hearing on S.605 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 5-6 (1985) (testimony of Ely Mauier), quoted in Rosencrance, supra note 21, at 334 n.147.*

54. U.S.-Mexico Treaty, *supra* note 44, art. IV.

55. *Id.*

56. *Id.* art. V.

maintenance of each nation's cultural patrimony. The lack of provisions detailing the particulars of legitimate excavation and exchange reinforces this nationalist focus. The treaty serves and strengthens Mexico's objective of cultural retention, and evidences the United States' support for cultural nationalism.⁵⁷

A criticism of the treaty is its sole concentration upon recovery of materials already lost by the country of origin. The treaty contributes nothing substantive to preventing illicit traffic.⁵⁸ Nor does it address the difficulties encountered by resort to the judicial remedy of a civil action:⁵⁹ confrontation with an unfamiliar legal system, the need to obtain competent counsel in the forum state, and the related expenses of preparation for a judicial proceeding. Often, pursuance of a judicial remedy is not an expedient method of obtaining justice. Once the decision is made to pursue a judicial remedy, however, a plaintiff can take some comfort in the fact that the burden of proving that an object is stolen has been lessened by the *U.S. v. McClain* decision.⁶⁰

Subsequent to the conclusion of the bilateral treaty, Mexico enacted a national treasury law which provides a blanket prohibition on the export of all pre-Columbian movable and immovable archaeological monuments.⁶¹ The law effectively prohibits export of a vast majority of Mexican cultural property, because most Mayan objects are of monumental origin. The treasury law is inconsistent with the bilateral treaty's commitment to legitimate cultural trade and exchange. Mexico's 1972 law has been criticized by U.S. lawyers and art experts as severely hindering the 1970 bilateral agreement's goal of legitimate commerce.⁶² No distinction is made between objects of outstanding cultural importance, and those of little

57. See Merryman, *supra* note 2, at 851-52 (discussing United States policy since the late 1960's).

58. See Michael S. Blass, *Legal Restrictions on American Access to Foreign Cultural Property*, 46 *FORDHAM L. REV.* 1177, 1195 (1978) (discussing later treaties that attempted to make up for any shortcomings).

59. *Id.* at 1194.

60. For a discussion of the *McClain* decision, see *infra* notes 211-218 and accompanying text.

61. Mexican 1972 Cultural Property Act, *supra* note 19, art. 27, quoted in Niec, *supra* note 7, at 1110.

62. Blass, *supra* note 58, at 1194.

significance or redundancy that U.S. critics believe Mexico should be willing to trade. Therefore, a legal market of Mayan artifacts becomes virtually impossible.

2. Between the U.S. and Peru: A Comparison

For perspective, a comparison of legal cooperative mechanisms between the U.S. and other art rich countries in Latin America is useful. The United States has entered bilateral agreements with other Latin American states regarding regulation of cultural property.⁶³ A 1981 agreement with Peru is appropriate for comparison, because Peru possesses a cultural heritage similar to Mexico's in both its nature and quantity of artifacts. Further, Peru, like Mexico, has also experienced a drastic depletion of its cultural heritage as a result of illegal excavations and export. Upon the request of then Peruvian Ambassador Fernando Schwalb Lopez Aldana, the United States and Peru concluded an executive agreement, signed in Lima on September 15, 1981.⁶⁴

The U.S.-Peru agreement is very similar in its provisions to the U.S.-Mexico treaty. Because it is an executive agreement, it does not provide authorization for the United States to bring legal action on behalf of Peru.⁶⁵ The U.S.-Mexico treaty contains more detailed procedures for the return of cultural property than does the executive agreement with Peru.

The agreement's preamble recognizes the importance of cooperation in the protection, study, and exhibition of culturally significant objects.⁶⁶ Archaeological, historical and cultural properties are defined as art objects and artifacts of the pre-

63. Agreement Respecting the Recovery & Return of Stolen Archaeological, Historical and Cultural Properties, Sept. 15, 1981, U.S.-Peru, 33 U.S.T. 1608, T.I.A.S. No. 10,136 [hereinafter U.S.-Peru Agreement of 1981]; Agreement for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, May 21, 1984, U.S.-Guatemala, T.I.A.S. No. 11,077; Agreement for the Recovery and Return of Stolen Archaeological, Historical and Cultural Properties, Nov. 17, 1983, U.S.-Ecuador, T.I.A.S. No. 11,075.

64. Frederic J. Truslow, *Peru's Recovery of Cultural Patrimony*, 15 N.Y.U. J. INT'L L. & POL. 839, 845 (1983).

65. *Id.* at 846.

66. U.S.-Peru Agreement of 1981, *supra* note 63, preamble.

Columbian cultures or the colonial period, or documents from pre-1920 official archives "that are the property of federal, state, or municipal governments or their instrumentalities or of religious organizations . . ." ⁶⁷ Each party agrees to inform the other of cultural property thefts, and if informed, to take actions to detect the entry and location of those objects within its territory. ⁶⁸ Both parties are required to utilize available legal means to return the property in question. ⁶⁹ Requests are to be made through diplomatic channels, with the expense and burden of production of evidence residing with the requesting party. ⁷⁰ The requested party must return the object upon receipt of legal authorization. If legal authorization is denied, the requested party must protect the legal rights of the requesting party and facilitate the bringing of a private action for return. ⁷¹ The U.S.-Peru agreement adds only one significant provision not found in the Mexican treaty: the parties are to inform travelers of the laws respecting archaeological, historical or cultural properties by means of media dissemination, such as signs, pamphlets, and billboards. ⁷² The publication provision demonstrates a commitment to the education and awareness of the general public.

B. Multilateral

Increasingly, *ad hoc* bilateral cooperation arrangements to combat transnational crime have been supplemented by multilateral arrangements. Such multilateral arrangements are of two types, universal and regional. On a universal level, the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention is the key mechanism to combat the illegal trade in cultural property. On a regional level, the Inter-American (San Salvador) Convention of 1976 is the most important instrument, even though it has not yet taken effect.

67. *Id.* art. I(2).

68. *Id.* art. II(1).

69. *Id.* art. II(2).

70. *Id.* art. II(3).

71. *Id.* art. II(4).

72. *Id.* art. II(5).

1. UNESCO

The United Nations Educational Scientific and Cultural Organization (UNESCO) adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property in 1970.⁷³ It was the first global agreement regarding international trade in illicit cultural objects. The Convention walks a middle line in trying to accommodate the interests of both the art importing and the art exporting nations. Initial responsibility of prevention is placed on exporting nations, while the importing nations' cooperation is expected in the recovery of illegally exported property. Its final form represents a compromise between the original draft of 1969, which proposed a strict system of export controls similar to national treasure laws,⁷⁴ and an alternative draft composed by a panel of experts organized by the American Society for International Law on behalf of the United States.⁷⁵ The Convention entered into force for Mexico on Jan. 4, 1973, and for the United States on Dec. 2, 1983.⁷⁶

The UNESCO Convention Preamble espouses the importance of both an interchange of cultural property among nations and its protection from theft or illegal export, recognizing the significance of a nation's cultural property to its civilization. Several articles are of particular pertinence to the enforcement of these ideals. Article 2

73. UNESCO Convention, *supra* note 1. International agreements in existence prior to 1970 regarding the protection of cultural materials dealt with the problem in the context of military conflict. *See, e.g.*, The UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

74. Under the preliminary draft, cultural objects could only be exported upon the issuance of an authorized export certificate by the exporting state; the import of property unaccompanied by an export certificate was forbidden; nations were required to keep national inventories of cultural materials and erect protection services; import control violators were subject to sanctions; and antique dealers were required to maintain a register accounting for the provenance of cultural objects. Rogers and Cohen, *supra* note 34, at 317.

75. Blass, *supra* note 58, at 1192; *see* Gonzalez, *supra* note 30, at 330. The American Society of International Law draft eliminated the requirements of a national inventory, mandatory import restrictions, and imposition of sanctions, and it also advocated mutual commitment to the return of property stolen from museums, a crisis provision in the event of imminent destruction of a nation's cultural patrimony, and assistance in the identification of cultural materials. Rogers and Cohen, *supra* note 34, at 318.

76. 19 C.F.R. § 12.104b(a) (1991).

recognizes international cooperation as the best means of safeguarding a country of origin's cultural heritage, and admonishes states to oppose illicit efforts against the protection of cultural property "with the means at their disposal."⁷⁷ Article 3 defines as "illicit" any trade in cultural property that "is effected contrary to the provisions adopted under this Convention by the States and Parties thereto." This enables source countries such as Mexico to enact legislation that in effect prohibits the export of any pre-Columbian and colonial materials. The broad language of Articles 2 and 3 leaves each state with the options of doing very little or employing comprehensive means to implement the Convention.

Article 4 categorizes cultural heritage into five groups: (1) created by nationals, foreign nationals or residents while within the state; (2) found within the state; (3) acquired through scientific missions with the consent of the country of origin; (4) acquired through a free exchange; or (5) received as a gift or legally purchased. Under Article 4, a nation may be free to exercise control over objects within its borders that are neither indigenous, nor have any link with the origins of the states' civilization. Therefore, it is quite possible to achieve the absurd result (from the nationalist perspective) of Italy claiming a painting by Monet, legally purchased by the Italian government, as a part of its cultural heritage. Market countries, dissatisfied with source countries' power to define "illicit" without the participation of dealers, collectors and museums in the market countries has resulted in delays by market countries such as the U.S. to ratify the Convention.⁷⁸

Article 5 provides that parties shall, "as appropriate for each country," institute national services to oversee the protection of cultural heritage and to perform the following functions: (1) assist in formulation of laws and regulations; (2) set up a national inventory of cultural property; (3) organize archaeological excavations; (4) establish ethical rules for collectors and dealers; (5) promote educational measures; and (6) publicize the loss of items. While these functions are comprehensive, the proviso "as appropriate for each

77. UNESCO Convention, *supra* note 1, art. 2, para. 2.

78. Merryman, *supra* note 2, at 845.

country”⁷⁹ significantly lessens their mandatory effect. The United States, in its implementation of the Convention, refused to establish national mechanisms to monitor preservation activities and to require dealers to maintain an accounting of property sold.⁸⁰ Articles 6 and 7 provide domestic control measures. Article 6 undertakes the introduction of an export certificate that is to accompany all items of cultural property exported, and mandates the denial of export unless so accompanied. The United States has recognized the financial and logistical burden of implementing a certificate system, and has made a formal reservation to this article in its ratification of the UNESCO Convention. The reservation retains the right of the U.S. to decide whether to impose export controls over cultural property.⁸¹

Article 7(a) requires states to take measures “consistent with national legislation” to prevent museums and institutions from acquiring illegally exported cultural property. The United States applies 7(a) only to “institutions whose acquisition policy is subject to national control under existing domestic legislation.”⁸² Because the majority of U.S. museums are state or privately owned, article 7(a) is inapplicable to these institutions. This is a weakness in the United States implementation of the Convention, because it allows most institutions the freedom to determine their own acquisition policies. On the whole, however, these institutions have felt morally obligated to promulgate ethical acquisition policies independent of an obligation under the Convention.⁸³

Article 7(b) prohibits the import of cultural property stolen from these institutions, and provides for its return upon request of the country of origin. The requesting nation must compensate an innocent purchaser or person with valid title, and pay expenses incident to its return and delivery. In the U.S., this provision is understood to be “without prejudice to other remedies, civil or penal,

79. UNESCO Convention, *supra* note 1, art. 5.

80. S. Exec. Rep. No. 29, 92nd Cong., 2d Sess. 9, 19-20 (1972), *quoted in* Gonzalez, *supra* note 30, at 334.

81. Gonzalez, *supra* note 30, at 334.

82. *Id.*

83. See The Pennsylvania Declaration, *supra* note 6; The Harvard Report, *supra* note 6.

available”⁸⁴ in state or federal courts. The U.S. understanding is designed to prevent impingement upon existing national penal remedies, primarily the National Stolen Property Act (NSPA).⁸⁵

The Convention authorizes the imposition of sanctions or penalties by each state in article 8. In the United States, the existing sanctions of the NSPA apply.⁸⁶ No new penalties are considered necessary by the U.S.

The heart of the Convention⁸⁷ is article 9, an emergency provision covering the situation in which a state’s cultural patrimony is in jeopardy from pillage. The threatened nation may rely on an international effort to carry out protective measures regarding the specific property concerned. Each state shall, to the extent possible, “take provisional measures . . . to prevent irremediable injury to the cultural heritage of the requesting state.”⁸⁸ The United States and Mexico are exemplary of the crisis situation addressed in article 9, by virtue of the magnitude of the illicit pre-Columbian trade. Indeed, the actions instituted by both nations with regard to the problem are in accord with the spirit and letter of this provision.⁸⁹

Article 13 has special significance in the context of U.S.-Mexican relations. The article provides that states are to recognize the right of a nation to declare certain cultural property as inalienable “which should therefore *ipso facto* not be exported.”⁹⁰ The U.S. has conformed to the article by its acceptance of Mexico’s 1972 Cultural Property Act, which declares all archaeological monuments the property of Mexico.⁹¹ U.S. Customs officials, pursuant to customs regulations, will seize any pre-Columbian objects for which their is

84. Gonzalez, *supra* note 30, at 335.

85. S. Rep. No. 29, *supra* note 80, at 21.

86. 18 U.S.C. §§ 2314-15 (1970).

87. Pres. Nixon’s Message of Transmittal of Convention on Ownership of Cultural Property, February 2, 1972, *reprinted in* Meyer, *supra* note 31, at 280.

88. UNESCO Convention, *supra* note 1, art. 9.

89. Gonzalez, *supra* note 30, at 336. The U.S.-Mexico Bilateral Treaty and the U.S. Pre-Columbian Act are measures taken in response to a crisis situation, and are in compliance with article 9 of the Convention.

90. UNESCO Convention, *supra* note 1, art. 13.

91. See *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977).

no valid export certificate or those included on a list of protected artifacts.⁹²

The Convention has only a limited effect upon the illicit trade in cultural property. The fact that great discretion is left to each party in its implementation of the convention significantly decreases its efficacy. States may choose to take negligible action, or apply their own interpretations of certain provisions. The Convention directly applies only to objects stolen from museums or institutions.⁹³ It is not retroactive, and even in recent incidents the Convention has been held inapplicable, unless it is shown that an artifact has been illegally exported after the agreement has entered into force for both states involved.⁹⁴ Such facts are often difficult to prove. The UNESCO Convention has also suffered criticism for its lack of formal dispute resolution provisions.⁹⁵

UNESCO itself has been subject to criticism in recent years. Critics have charged the organization with becoming too political, straying from its original mandate, and espousing anti-Western policy.⁹⁶ The United States and the United Kingdom have withdrawn as members of the organization, thereby reducing UNESCO's budget.⁹⁷ The lack of their substantial financial contribution may further weaken the effectiveness of the UNESCO Convention.

However, the UNESCO Convention does serve as a codification of general goals and objectives for the cessation of an illicit trade, and provides several means for attacking the problem. The Convention encourages an international solution by operating as a defined philosophy. Parties to the Convention, particularly art rich source nations, should find it in their best interest to implement the provisions. Most importantly, the Convention is the only mechanism of universal application. Achieving agreement on conventions of universal application necessarily requires compromise and limiting

92. Pre-Columbian Act, *supra* note 24, § 2092(b).

93. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 258 (1989).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

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the scope of the convention to the elements on which agreement can be reached. A necessary supplement is to conclude regional and bilateral agreements and institutional frameworks as has occurred in the area of combating illicit drug trafficking.

2. Regional Initiatives in the Americas

a. The Roerich Pact of 1935 on the Protection of Artistic and Scientific Institutions and Historic Monuments

In 1935, the Supervisory Committee of the Governing Board of the Pan-American Union, the predecessor organization to the Organization of American States (OAS), prepared a draft of the Treaty on the Protection of Movable Property of Historic Value, 1935, also known as the Roerich Pact.⁹⁸ It has a very broad classification of items covered as movable monuments under the headings of the pre-Columbian period, the colonial period, the period of emancipation and the republic, and all periods. The Pact, or Convention, was designed to protect items of cultural heritage in times of war. The Convention has been ratified by Brazil, Chile, Colombia, Cuba, the Dominican Republic, El Salvador, Guatemala, Mexico, the United States, and Venezuela.⁹⁹

The principal purpose of the Convention was to develop respect for and protection of “the treasures of culture . . . in time of war and in peace.”¹⁰⁰ Under Article 1, belligerents must treat as neutral certain institutions, historical monuments, museums, and scientific, artistic, educational and cultural institutions in times of peace as well as in times of war.

Some have noted that the Convention is ambiguous about specifying who must respect and protect the monuments and

98. The Treaty's name originated from suggestions made in 1929 by Nicholas Roerich, a Russian artist who had immigrated to the U.S. In 1923, the Roerich Museum was established by one of his patrons, Horch, a wealthy American. A draft Pact was prepared at the request of the Museum by Georges Chklaver. 3 LYNDEL V. PROTT AND P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 688-89 (1989).

99. *Id.*

100. *Id.* at 689.

institutions, although the signatory countries, including the country in which the monuments and institutions are located, would seem to have the responsibility.

The Convention provides for a flag having a red circle with a triple red sphere in the circle on a white background to identify the monuments and institutions covered. The signatory countries have the obligation of sending to the Pan-American Union, now the OAS, a list of the monuments and institutions for which protection is sought.

b. Inter-American (San Salvador) Convention of 1976

In 1969, the OAS established a Regional Program for Cultural Development whose objectives were to extend inter-American cooperation to the preservation and use of archeological, historic, and artistic monuments, in order to contribute to the protection of the monumental and artistic heritage of the member states.¹⁰¹ In September 1970, the Inter-American Cultural Committee adopted Resolution 38 which asked the OAS General Secretariat to appoint a Task Force to prepare a multilateral agreement on the protection of cultural heritage.¹⁰²

The San Salvador Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations was adopted unanimously by the General Assembly of the Organization of American States on June 16, 1976.¹⁰³ Neither the United States nor Mexico are signatories, but it is useful to examine the Convention because it represents a regional effort at regulation among the countries of the Americas.¹⁰⁴ Mexico was originally involved in the drafting of the Convention, but did not become a signatory.¹⁰⁵ The United States objects to several aspects of the

101. O.A.S. Official Records OEA/Ser.J/II.8.4.

102. O.A.S. Gen. Assembly Resolution 210 (VI-0/76).

103. Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, 15 I.L.M. 1350 [hereinafter Convention of San Salvador].

104. The countries that are members to the Convention are Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, and Peru.

105. Telephone interview with Diego Azcevedo, Principal Legal Adviser, Organization of American States (Mar. 19, 1992).

Convention.¹⁰⁶ Article 2 of the Convention categorizes cultural property to include those materials, including flora, fauna, and human remains, existing prior to contact with European culture (pre-Columbian); materials from the colonial era and the 19th century; books, publications, and like materials published prior to 1850; objects originating subsequent to 1859 that have been recorded as cultural property; and any other property declared to be cultural by a party to the convention. Cultural heritage may be found or created within a state, or legally acquired from another nation.¹⁰⁷ The export and import of such property is unlawful, unless the country of ownership authorizes exportation for educational purposes.¹⁰⁸ This operates as a narrow constraint upon permissible trade in cultural property, and is correspondingly stricter than the UNESCO Convention.

The Convention of San Salvador provides for dispute resolution by the Inter-American Council for Education, Science, and Culture (CIECC).¹⁰⁹ Several of the provisions concerning the types of protective measures to be implemented closely parallel UNESCO.¹¹⁰ The Convention exposes those responsible for

106. The United States explained its objections to the Convention:

We believe the convention . . . is too broad in scope and rigid in its enforcement provisions. It would effectively prohibit the import and export of an enormous range of cultural materials—without regard for their value or cultural importance - and place principal enforcement responsibility on the importing state. Under the terms of the convention, the importing state would be under the same obligation to use all legal means to obtain recovery, whether an item is an insignificant piece purchased by an unwitting tourist or a stolen museum treasure. . . . [I]t would impose an administrative burden on regional customs services which no state can be expected to accept and would also encourage the continued growth of a black market.

Portions of a note from Terrence A. Todman, Ass't Secretary for Inter-Am. Affairs, Dep't. of State, to Ambassador Rodolfo Silva, Chmn. of the Permanent Council of the OAS, Aug. 26, 1977, OEA/Ser. G., CP/INF, 1173/77, reprinted in DIG. U.S. PRAC. INT'L L. 880-81 (J. Boyd ed. 1977); James Nafziger, *International Penal Aspects of Crimes Against Cultural Property and the Protection of Cultural Property*, in INTERNATIONAL CRIMINAL LAW AND CRIMES 530 n.23 (M. Cherif Bassiouni, ed., 1986).

107. Convention of San Salvador, *supra* note 103, art. 5.

108. *Id.* art. 3.

109. *Id.* art. 4.

110. *Id.* arts. 7, 8, 15.

cultural property crimes to extradition laws in appropriate circumstances.¹¹¹

Apparently, the Convention of San Salvador has not been effective.¹¹² First, as mentioned, neither Mexico nor the U.S. are parties to the Convention. Therefore, the primary importer of pre-Columbian artifacts and the primary source of the objects do not abide by the Convention's efficacy. Secondly, the list of items included in the definition of "cultural property" under the convention is not sufficiently broad; indeed, the list is in several instances narrower than the municipal legislation of many states. Finally, the Convention's enforcement provisions are weak. The enforcement required by the agreement to prohibit the export and import of cultural property is only that a state is encouraged, under Article 7(c), to prohibit imports of cultural property from other states without an appropriate certificate and authorization, and, under Article 10, to "take whatever measures it may consider effective to prevent and curb the unlawful exportation, importation, and removal of cultural property. . . ."¹¹³ In contrast, the growing tendency of countries is to make unlawful the import of items unlawfully exported from another state. Canada and Australia have enacted or adopted such laws.¹¹⁴

c. ILANUD

In 1983, the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD) convened a meeting of experts to investigate offenses against Latin American archaeological heritage. Two resolutions were passed.¹¹⁵ Resolution 1 proposed the establishment of an information center to distribute information on programs, resources and experts in the different countries. It also suggested exchanges of information on

111. *Id.* art. 14.

112. Nafziger, *supra* note 106, at 530 n.24.

113. Convention of San Salvador, *supra* note 103, art. 5.

114. Prott & O'Keefe, *supra* note 98, at 693.

115. Resolutions 1 and 2 of San Jose, Feb. 9, 1983, *cited in* 3 PROTT & O'KEEFE, *supra* note 98, at 694 (1989).

“undesirable” persons, professional or otherwise, who acted in unscrupulous or unprofessional ways or were looters or traffickers with whom any country in the region had adverse experiences. Resolution 2 focused on the link between the large amounts of theft of cultural artifacts from developing countries and their need for development. It recommended that effective protection of the cultural heritage be included in the goals of the New International Economic Order. However, it appears that ILANUD has not acted on either of these Resolutions.¹¹⁶

The Organization of American States, ILANUD, and other international organizations should not be overlooked as a means through which further regional cooperation can be achieved. In fact, the established intergovernmental structure of the OAS offers the most promising opportunity for regional initiatives in the Americas. Membership is exclusively composed of nation states, but unlike the European Community, the OAS does not possess supranational authority.¹¹⁷ The General Assembly holds meetings on an annual basis. The OAS coordinates its activities with United Nations agencies and other regional non-governmental organizations on specific issues, such as human rights.¹¹⁸ It is feasible that the Council for Education, Science, and Culture of the OAS or specialized agencies within the OAS could engage in cooperative cultural property measures with other organizations such as Interpol¹¹⁹ or the regional group ILANUD.¹²⁰

Prospectively, if a considerable amount of integration is achieved through either NAFTA or the Enterprise for the Americas initiative, the OAS could acquire supranational aspects. Such integration would greatly enhance prospects for a unified and effective policy toward protecting stolen cultural property in the Americas. Likewise,

116. *Id.*

117. Telephone interview with Diego Azcevedo, *supra* note 105.

118. *Id.*

119. The International Criminal Police Organization (Interpol), among other things, monitors and coordinates art theft information between nations, and fosters cooperation among the police forces of different countries. Williams, *supra* note 12, at 146.

120. The United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD) is an international body concerned with, among other issues, cultural heritage matters. 3 PROTT & O'KEEFE, *supra* note 98 at 694.

structures would then exist that would allow the imposition of an enforcement mechanism. The prototypes for use of the OAS in international criminal cooperation are the establishment of the Program of Rio in 1985 and the Inter-American Drug Abuse Control Commission (CICAD). In the context of the Enterprise for Americas Initiative, NAFTA, and other economic integration efforts in the region, reexamination of the San-Salvador Convention and other alternatives for strengthening enforcement of prevention and punishment of illicit trade in cultural artifacts should be considered, especially by the leaders of the economic integration movements that have not joined the San Salvador Convention.

C. Other Conventions Enforcement Mechanisms

Understanding the mechanisms of bilateral cooperation against illicit trade in cultural property requires a discussion of the principal enforcement mechanisms now available. These mechanisms include extradition and mutual assistance in criminal matters, which were recently adopted by treaties between the U.S. and Mexico.

1. Extradition Treaty between the United States and Mexico

Mexico and the United States signed a treaty of extradition on May 4, 1978, which entered into force January 25, 1980.¹²¹ Under the treaty, offenses relating to the import or export of historical or archaeological items, or a violation of customs laws, are listed as extraditable crimes.¹²² The list of extraditable offenses also covers receipt of any property knowingly obtained unlawfully.¹²³ These offenses must be punishable in accordance with both states' domestic laws by imprisonment for not less than one year.¹²⁴ In the case of

121. Extradition Treaty between the United States of America and the United Mexican States, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059, T.I.A.S. No. 9656 [hereinafter U.S.-Mexico Extradition Treaty].

122. *Id.* apps. 21, 22.

123. *Id.* app. 12.

124. *Id.* art. 2(1).

extradition requested for the fulfillment of a sentence, there must be at least six months remaining to be served.¹²⁵

The treaty provisions are standard.¹²⁶ The most pertinent provision for the purposes of stolen cultural property is Article 19, the surrender of property. Objects relating to the offense in question shall be surrendered to the requesting nation upon granting of extradition, regardless of whether extradition can actually be accomplished.¹²⁷ This provision is subject to the rights of third parties and to the law of the requested party.¹²⁸ Further, the requested party may surrender objects subject to a condition that the requesting party return the object as soon as possible.¹²⁹ The provision could have the effect of returning the criminal to his country of origin, while the object of his bounty, the cultural artifact, remains in a foreign nation after a short return to the requesting state. Thus, the goal of repatriation of the object would fail. In all likelihood, Mexico would rely on cultural property legislation (i.e., the U.S.-Mexico Bilateral Treaty or UNESCO) before or in addition to resorting to the Extradition Treaty, but it does offer another alternative.

The Extradition Treaty has not been utilized much by the United States Government. Few formal requests for extradition from Mexico have been made by the United States. United States' extradition requests primarily focus on the extradition of drug traffickers.¹³⁰ Mexico has historically employed deportation rather than extradition.¹³¹ In many cases the two governments utilize informal

125. *Id.* art. 2(2).

126. Generally, the treaty articles cover the obligation to extradite, extraditable offenses, evidence required, territorial application, political and military offenses, lapse of time, capital punishment, extradition of nationals, extradition procedures and required documents, provisional arrest, additional evidence, procedure, decision and surrender, delayed surrender, requests for extradition made by third states, rule of specialty, summary extradition, surrender of property, transit, expenses, and scope of application. *Id.* at 5061-74.

127. *Id.* art. 19(1).

128. *Id.* art. 19(1).

129. *Id.* art. 19(2).

130. Bruce Zagaris, *Extradition between the U.S. and Mexico*, in DEVELOPMENTS IN MEXICAN-U.S. LAW ENFORCEMENT COOPERATION: WHAT THE PRACTITIONER NEEDS TO KNOW (Criminal Justice Section, American Bar Association, April 29, 1990) at 43.

131. *Id.*

rendition, such as handing over fugitives without resort to formal extradition. Informal procedures are especially common in the border area.

2. Treaty on Cooperation between the United States and Mexico for Mutual Legal Assistance

Mutual Legal Assistance on Criminal Matters Treaties (hereinafter MLATs) enable law enforcement authorities to acquire foreign evidence in a form admissible in the requested party's courts.¹³² They obligate each party to lend assistance upon request. An MLAT has advantages over letters rogatory and Interpol, other primary means of law enforcement cooperation.¹³³ Letters rogatory, which are written requests from a domestic court to a foreign court for assistance in obtaining evidence, are inefficient.¹³⁴ The letter must pass through several bureaucratic steps which consume time and may produce information unusable in court.¹³⁵

After several years of negotiation, the Mexico-U.S. Mutual Legal Assistance Treaty was signed on December 9, 1987.¹³⁶ The Mexican Senate approved the treaty on December 29, 1987 and the U.S. Senate voted to approve ratification on October 24, 1989. Because of some understandings in the U.S. ratification of the treaty, the Mexican Government delayed the exchange of instruments of ratification and the treaty did not take effect until May 1991. The MLAT provides Mexico and the U.S. with a diverse means of cooperating in criminal matters. Mutual assistance between the two states includes the taking of testimony or statements; the provision of documents, records, and evidence; the execution of search and seizure requests and requests to immobilize, secure or forfeit assets;

132. *Id.* at 23.

133. *Id.*

134. *Id.*

135. *Id.*

136. Mexico-United States Mutual Legal Assistance Cooperation Treaty, Dec. 9, 1987, U.S.-Mex., 27 I.L.M. 443 [hereinafter U.S.-Mexico MLAT].

transferral of persons in custody; and the exchange of information.¹³⁷

A few provisions in particular bear most directly upon cultural property trafficking. Article 11 provides that the Coordinating Party of either state may notify the requested party when it believes that fruits of a crime are located within the requested party's territory. Upon notification, the states shall assist one another in immobilizing, securing, and forfeiting the bounty.¹³⁸ If justified under the laws of the requested party, a search, seizure and delivery of the requested object shall ensue.¹³⁹ The executing authority of the search shall provide certification to the Coordinating Authority regarding the identity, condition and custody status of the seized object. The certification will then be considered admissible evidence.¹⁴⁰

The Mexican-U.S. MLAT contains a provision that the parties will meet at least every two years "in order to review the effectiveness of its implementation and to agree on whatever individual and joint measures are necessary to improve its effectiveness."¹⁴¹ Both nations are obligated to consult on a regular basis and to undertake modifications necessary to improve treaty efficacy. This flexible provision leaves open the possibility of adopting additional agreements or measures as needed, including measures directed specifically against illicit trafficking in cultural property.

III. NATIONAL LEGISLATION

National legislation for the prevention and punishment of illicit trade in cultural artifacts in Mexico and the U.S. is of several types. These types include legislation to further bilateral cooperation and implement the UNESCO Convention, and legislation to criminalize and prevent the export and import of illicitly obtained cultural artifacts.

137. *Id.* art. 1(4).

138. *Id.* arts. 11(1), (2).

139. *Id.* art. 12(1).

140. *Id.* art. 12(2).

141. *Id.* art. 18.

Four pieces of U.S. legislation cover the primary type of cultural property illegally exported between the U.S. and Mexico, property which originates in Mexico, and will be discussed in this section. The Pre-Columbian Act of 1972 was enacted to implement the 1972 Mexico-U.S. Protection of Cultural Property Treaty. The Cultural Property Implementation Act (CIPA) of 1983 was enacted to implement the UNESCO Convention. The National Stolen Property Act (NSPA) of 1988 provides a federal means of law enforcement. In addition, common law replevin actions provide a means of recovering stolen artifacts. The Archaeological Resources Protection Act (ARPA) of 1979, enacted as a means of protecting indigenous archaeological objects in the U.S., will be discussed. Mexican legislation protecting cultural property will be considered in a historical perspective.

A. United States

1. The Pre-Columbian Act of 1972

The Treaty of Cooperation between the United States and Mexico¹⁴² helped draw attention to the illicit trade in cultural property, but in itself did not effectively suppress the problem. In fact, the illegal Mexican pre-Columbian trade increased subsequent to ratification of the bilateral treaty.¹⁴³ Several Latin American countries and a panel conducted by the Society of International Law made requests for stronger measures.¹⁴⁴ The U.S. legislature responded by enacting the Pre-Columbian Act of 1972.¹⁴⁵ The law signifies the United States' support of and commitment to source nations' repatriation efforts.

142. Treaty of Cooperation Between the United States of America and the United Mexican States Providing for the Recovery and Return of Stolen Archaeological, Historical, and Cultural Properties, 1971, 22 U.S.T. 494, T.I.A.S. No. 7088, pt. 1.

143. Blass, *supra* note 58, at 1194.

144. H.R. Rep. No. 824, 92nd Cong., 2d Sess. 3 (1972), *cited in* Gonzalez, *supra* note 30, at 323.

145. Pre-Columbian Act, *supra* note 24.

The Act applies to any stone carving, wall art, or fragment thereof which is the product of a pre-Columbian Indian culture and is subject to export control by the country of origin.¹⁴⁶ The Secretary of the Treasury, after consulting with the Secretary of State, is to promulgate a list of artifacts included within the regulation's protection.¹⁴⁷ Materials on the list may only be imported into the U.S. if accompanied by a valid export certificate from the country of origin, certifying legal exportation.¹⁴⁸ The Act does not apply only to stolen sculptures or murals, but rather to any objects subject to export control.¹⁴⁹

United States customs officers are authorized to take into custody any pre-Columbian artifacts which are not accompanied by a required export certificate, not exported prior to the effective date of being listing as protected, or not shown to be excluded from the Act's list of protected artifacts.¹⁵⁰ A ninety day grace period is provided within which an importer may present the required certificate or evidence, and then the object will be released.¹⁵¹ Upon expiration of the period, importation of the object violates the Act.¹⁵²

Imports in violation of the Act's certification requirements are subject to the penalty of forfeiture.¹⁵³ Such items will first be offered to the country of origin, provided that country pays all expenses incidental to return.¹⁵⁴ Otherwise, the object will "be disposed of in the manner prescribed by law for articles forfeited in violation of the customs laws."¹⁵⁵ Disposition would "presumably" consist of a public auction, thereby undermining the regulation's purpose of repatriation.¹⁵⁶ Generally, the importer of the property will not be compensated for his loss unless he successfully petitions

146. *Id.* § 2095(3)(A).

147. *Id.* § 2091.

148. *Id.* § 2092(a).

149. *Id.* § 2095(3)(A)(iii).

150. *Id.* § 2092(b).

151. *Id.*

152. *Id.*

153. *Id.* § 2093(a).

154. *Id.* § 2093(b).

155. *Id.*

156. Gonzalez, *supra* note 30, at 325.

the Secretary of the Treasury for a remission or mitigation of the forfeiture action under the Tariff Act of 1930.¹⁵⁷ Source nations possess a strong interest in preventing the forfeiture of their cultural property to a foreign state, and would likely bear the costs of return.

The Act's focus on prohibiting the import of illicit objects at the border is a significant advancement over the U.S.-Mexico Treaty's attempts to recover items already imported.¹⁵⁸ Part of the Pre-Columbian Act's success may stem from its narrowly defined objectives, but the enforcement efforts of the Customs Service have also helped tremendously.¹⁵⁹ Customs officers apply the Act's restrictions even to the smaller non-monumental objects which do not fall within the protected list.¹⁶⁰ While customs' actions may seem overzealous, it is important to remember the valid objective of cultural exchange.

2. The Cultural Property Implementation Act

After a decade of debate, Congress enacted the Cultural Property Implementation Act (hereinafter CPIA);¹⁶¹ the United States' implementation of the UNESCO Convention.¹⁶² The Act's provisions specifically implement, with modifications, only Articles 7(b) and 9 of the UNESCO Convention.¹⁶³ The President of the United States may either enter into a bilateral agreement with a state

157. 19 U.S.C. § 1618 (1970). The mitigation can be given in circumstances in which the Secretary finds that "forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify [such relief]. . . ." *Id.*

158. Blass, *supra* note 58, at 1195.

159. Blass, *supra* note 58, at 1195 citing James Nafziger, *Controlling the Northward Flow of Mexican Antiquities*, 7 LAW AM. 68, 72-73 (1975).

160. Blass, *supra* note 58, at 1195.

161. Convention on Cultural Property Implementation Act of 1983, Pub. L. No. 97-446, §§ 301-315, 96 Stat. 2363 (codified as amended at 19 U.S.C. §§ 2601-2613 (1983)) [hereinafter CPIA]. The CPIA was enacted January 12, 1983. *id.*

162. Jeremy Sugerman, Note, *A New Cultural Property Repose Act*, 22 GEO. WASH. J. INT'L L. & ECON. 671, 676 n.29 (1989).

163. UNESCO Convention, *supra* note 1, arts. 7(b), 9. Article 7(b) pertains to the prohibition on importing cultural property stolen from museums, and the provisions for its return upon request. Article 9 is an emergency provision regarding states whose cultural patrimony is in jeopardy of pillage. Rosencrance, *supra* note 21, at 319.

whose cultural patrimony is in jeopardy, or into a multilateral agreement with that party and other nations in order to apply designated import restrictions.¹⁶⁴ The President may enter such an agreement if he determines, after request, that the cultural patrimony of a state is in jeopardy due to pillage of ethnological and archaeological materials, that the state party has taken measures to protect its cultural patrimony, that the application of import restrictions would substantially deter pillage and less drastic remedies are not available, and that the application of import restrictions would be consistent with the international community's interest in cultural property interchange.¹⁶⁵ The state party must request assistance accompanied in writing by factual documentation.¹⁶⁶

Restrictions are placed upon the President's ability to enter into agreements. Unless import restrictions under the Convention are applied in concert with similar restrictions implemented by nations with a significant import trade in the jeopardized property, the President may not enter into an agreement.¹⁶⁷ An agreement by the U.S. must be suspended if similarly situated nations do not implement restrictions within a reasonable period of time.¹⁶⁸ This restriction places a burden of multilateral action on the international community, to ensure that no art importing nation takes unfair advantage of the resulting shift in the market caused by unevenly imposed import restrictions. Further, an agreement may be extended for not more than five years.¹⁶⁹ Explicit procedures must be followed with regard to requests by states and extensions of agreements.¹⁷⁰

Unilateral action by the United States is allowed under emergency conditions.¹⁷¹ An emergency condition arises when archaeological or ethnological material is: (1) a newly discovered

164. CPIA, *supra* note 161, § 2602(a)(2).

165. *Id.* § 2602(a)(1).

166. *Id.* § 2602(a)(3).

167. *Id.* § 2602(c)(1). Section 2602(c)(2) creates an exception to the general restriction, if the President determines multilateral restrictions are not essential to deter pillage.

168. *Id.* § 2602(d).

169. *Id.* § 2602(e).

170. *Id.* § 2602(f),(g).

171. *Id.* § 2603(a).

type of material important to the understanding of mankind and is in jeopardy of pillage; (2) found at a site of high cultural significance and is in jeopardy of crisis proportions; or (3) a part of the remains of a culture or civilization whose record is in jeopardy of crisis proportions.¹⁷² Temporary application of import restrictions must afford relief from pillage, dismantling, dispersal, or fragmentation.¹⁷³ Several explicit limitations apply regarding the President's decision to implement emergency import restrictions, including a time limit of five years with the possibility of a three year extension.¹⁷⁴ Subsequent to an agreement or emergency action, the Secretary of the Treasury must promulgate a precise and specific list of protected ethnological or archaeological materials.¹⁷⁵

The list insures fair notice to importers of the restrictions on certain objects which the United States Customs Service enforces through regulations.¹⁷⁶ Listed objects shall not be allowed to enter the United States unless accompanied by a valid export certificate.¹⁷⁷ Importation in the absence of documentation will, however, be permitted if the consignee can provide satisfactory evidence¹⁷⁸ that the object was exported at least ten years before the date of entry, and the person for whom the object was imported did not acquire an interest in the property more than one year before date of entry or prior to the object's designation as protected property.¹⁷⁹ Ten years is a sufficient period to discourage looting, while still providing access to the American market for legitimately acquired materials.¹⁸⁰ These restrictions exemplify the United States' dual objectives of deterring illicit trade and promoting cultural exchange.

If the requirements are not met for importation, the customs officer must hold such material at the risk and expense of the consignee until documentation is received. The object is subject to

172. *Id.*

173. *Id.*

174. *Id.* § 2603(c).

175. *Id.* § 2604.

176. 19 C.F.R. § 12.104 (1991); Rosencrance, *supra* note 21, at 320.

177. CPIA, *supra* note 161, § 2606(a).

178. *Id.* § 2606(c).

179. *Id.* § 2606(b).

180. Blass, *supra* note 58, at 1199.

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forfeiture if documentation is not provided within ninety days after being taken into custody.¹⁸¹ Forfeited material shall first be offered for return to the State Party before being disposed of according to U.S. customs laws.¹⁸²

The Act establishes a Cultural Property Advisory Committee to investigate and review requests for import restrictions, and to make recommendations regarding agreements.¹⁸³ Advisory Committee members represent the interests of museums, scientific experts, dealers, and the general public.¹⁸⁴ Committee recommendations are not binding upon the President; he need only consider Committee reports if they are submitted within the statutory time period.¹⁸⁵ Therefore, the Committee's influence over the President's decisions may be negligible, and would not act as an effective check upon presidential authority.

Section 2607 of the CPIA implements Article 7(b) of the UNESCO Convention by prohibiting the import of any cultural property stolen from a museum, religious or public monument, or similar institution.¹⁸⁶ To qualify for protection, the cultural property must be documented as inventory by the institution.¹⁸⁷ The provision is unique from other CPIA sections in that it covers all cultural property, not only archaeological and ethnological materials.¹⁸⁸ Seizure and forfeiture provisions of the CPIA apply to section 2607.¹⁸⁹

The United States' implementation of the UNESCO Convention contains a section not included in the Convention itself, regarding

181. CPIA, *supra* note 161, § 2606(b).

182. *Id.* § 2609(a), (b). The CPIA's forfeiture provisions parallel those of the Pre-Columbian Act. *See supra* note 24 and accompanying text.

183. *Id.* § 2605(f).

184. *Id.* § 2605(b).

185. *Id.* §§ 2602(f)(3), 2603(c)(2).

186. *Id.* § 2607.

187. *Id.*

188. Rosencrance, *supra* note 21, at 320.

189. CPIA, *supra* note 161, § 2609(c). If the claimant establishes valid title to the object, forfeiture shall not be declared unless the State Party pays the claimant just compensation. If the claimant establishes that the article was purchased without knowledge that it was stolen, forfeiture shall not occur unless (1) the State Party pays the claimant an amount equal to that paid by the claimant, or (2) the U.S. establishes that the State Party would return an article without compensation in similar circumstances based on the law of reciprocity. *Id.*

certain materials exempt from the CPIA.¹⁹⁰ Exemption under this provision is dependent upon several factors including the length of time an object has been in the United States, who is in possession, and whether the property has been exhibited, catalogued, or notice of its acquisition has been published.¹⁹¹ Specifically, four categories of material are exempt from a State Party's claims: (1) material purchased in good faith and held by an institution if its acquisition has been reported, it has been exhibited for one out of three consecutive years, or it has been catalogued and available to the public for two years;¹⁹² (2) material that has been in the United States at least ten consecutive years and exhibited publicly at least five years;¹⁹³ (3) property that has been in the United States for at least ten consecutive years and the State Party should have received notice of its location;¹⁹⁴ and (4) material that was purchased in good faith and has resided in the United States for at least twenty consecutive years.¹⁹⁵ This section attempts to assuage the fears of art dealers and collectors that no legitimate cultural trade would remain after implementation of the CPIA.¹⁹⁶

Some critics, museums, and art dealers have sought additional revisions of the CPIA. These proposals include a better defined and simpler system of repose for objects currently in this country and a provision for reimbursement of a good faith purchaser who would forfeit an illicitly obtained object as would normally be provided for in a business purchase context.¹⁹⁷

190. *Id.* § 2611.

191. Sugerman, *supra* note 162, at 678.

192. CPIA, *supra* note 161, § 2611(2)(A).

193. *Id.* § 2611(2)(B).

194. *Id.* § 2611(2)(C).

195. *Id.* § 2611(2)(D).

196. Sugerman, *supra* note 162, at 679 n.63.

197. Persick, *supra* note 38, at 100, citing Statements of Metropolitan Museum of Art, TO IMPLEMENT THE UNESCO CONVENTION ON CULTURAL PROPERTY: HEARINGS ON H.R. 3403 BEFORE THE SUBCOMM. ON TRADE OF THE COMM. ON WAYS AND MEANS, 96th Cong., 1st Sess. 87-91 (1979).

3. The National Stolen Property Act

The National Stolen Property Act (NSPA) prohibits the transportation or receipt, in interstate or foreign commerce, of any goods knowingly stolen and worth \$5,000 or more.¹⁹⁸ Violators of the NSPA will be subject to fines not to exceed \$10,000, or imprisonment, or both.¹⁹⁹ The Congressional purpose in formulating NSPA was to discourage the taking and receiving of stolen property.²⁰⁰ Intended to aid the states by providing a federal means of law enforcement, the Act also benefits foreign countries through its express applicability to foreign commerce.

Prior to the NSPA, neither states nor foreign countries could prosecute individuals after the property had moved across state lines or national borders.²⁰¹ Under the NSPA, violators are prosecuted by the United States, and the disposition of the property is determined in a forfeiture proceeding, subsequent to the criminal conviction.²⁰² Property owners benefit most from the NSPA because of the expanded governmental protection of property rights.²⁰³ Because Mexico's 1972 Cultural Property Act declares that the Mexican state is the owner of Mexican cultural materials,²⁰⁴ the NSPA need not address their disposition.

The NSPA has led to prosecutions for the illegal export of pre-Columbian artifacts from a foreign country into the United States. *United States v. Hollinshead*²⁰⁵ represents the first instance in which a U.S. court upheld the validity of a national ownership statute. In this case, Clive Hollinshead, a dealer in pre-Columbian artifacts, and co-conspirators illegally excavated and attempted to sell a Mayan stela known as "Machaquila 2."²⁰⁶ The stela had been documented

198. 18 U.S.C. §§ 2314, 2315 (1990).

199. *Id.*

200. *U.S. v. McClain*, 545 F.2d at 994.

201. *Id.*

202. Jonathan S. Moore, *Enforcing Foreign Ownership Claims in the Antiquities Market*, 97 YALE L.J. 466, 471 (1988).

203. *Id.*

204. Mexican 1972 Cultural Property Act, *supra* note 19.

205. *U.S. v. Hollinshead*, 495 F.2d at 1154.

206. *Id.*

while at its original location in Guatemala.²⁰⁷ Under Guatemalan law, all such objects are the property of the government.²⁰⁸ Guatemala brought a civil suit for the return of the stela, and the United States instituted a criminal action under the NSPA.

Hollinshead's criminal conviction was upheld by the Ninth Circuit. The court held that a conviction pursuant to the NSPA only required a showing that the defendant knew the stela was stolen.²⁰⁹ The U.S. government was not required to prove the defendants knew the location from which the object was stolen, or that they knew the law of the country in which the theft occurred.²¹⁰ The artifact's documentation, in concert with Guatemala's national ownership statute, was adequate to prove Guatemalan ownership. The *Hollinshead* case is unusual in its fortuitous circumstances; rarely is a stolen object previously documented by the country of origin.

The NSPA was further interpreted in *United States v. McClain*,²¹¹ where the critical question was whether illegal export of objects from a country with a national ownership statute was sufficient evidence of theft for conviction under the NSPA. The U.S. Court of Appeals, Fifth Circuit, held that a "declaration of national ownership is necessary before illegal exportation of an object can be considered theft, and the exported object considered 'stolen,' within the definition of the NSPA."²¹² In that case, a declaration by Mexico of national ownership, coupled with a restriction on exportation without consent of the state, was sufficient to trigger the NSPA's provisions.²¹³

Commentators interpret the *McClain* holding as a change in U.S. policy. Prior to *McClain*, the general rule was that the mere fact of illegal export did not render the import of a work of art illegal under

207. Moore, *supra* note 202, at 474-475. Archaeologist Ian Graham of Harvard University had documented and sketched the stela in 1962, at the ruins of Machaquila, Department of Peten, Guatemala. Upon his return in 1968 to the site, the stela was still intact. GREENFIELD, *supra* note 93, at 194.

208. Hollinshead, 495 F.2d 1155.

209. U.S. v. McClain, 545 F.2d at 994.

210. *Id.*

211. *Id.* at 988.

212. *Id.* at 1000-1001.

213. *Id.*

U.S. law.²¹⁴ Private collectors, dealers, museums and some legislators strongly oppose the *McClain* decision²¹⁵ on the grounds that U.S. recognition of national ownership statutes places an inordinate risk on purchasers.²¹⁶ Critics claim the decision considerably broadens the definition of "stolen" and calls into question the meaning of "ownership."²¹⁷ To date, there has been no court ruling or successful legislation in contradiction of the *McClain* holding.²¹⁸

4. *Common Law Replevin Action*

Replevin actions are another means of recovering stolen artifacts. Recovery of cultural property through a civil action before a state or federal court has long been available in many nations, including the United States.²¹⁹ An action may be brought against any possessor of stolen property, regardless of whether he is a good faith purchaser.²²⁰ The common law rule that a purchaser cannot acquire valid title from a thief puts liability on purchasers.²²¹ All buyers are required to forfeit the object, even if they are ignorant of its taint of illegality.

A benefit to plaintiffs in replevin actions is that, in contrast to the NSPA, scienter need not be proven. Additionally, no negotiation for the return of the object is necessary; the defendant must forfeit the stolen object to the country of origin.²²² However, there are

214. Paul Bator, *International Trade in National Art Treasures: Regulation and Deregulation*, in *ART LAW: DOMESTIC AND INTERNATIONAL* 295, 300 (Leonard D. DuBoff ed., 1975).

215. Moore, *supra* note 202, at 478.

216. *Id.* at 476.

217. Sugerman, *supra* note 162, at 682 n.79.

218. Congress did consider a bill that would have removed cultural property from the ambit of the NSPA and nullify *McClain*, but its passage was not successful. S. 605, 99th Cong., 1st Sess. (1985), cited in Rosencrance, *supra* note 21, at 312 n.14.

219. Merryman, *supra* note 2, at 851. Cf. *Kuntsammlungen zu Wiemar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982) (involving two Durer portraits stolen at the end of World War II which were ordered returned to East Germany).

220. Moore, *supra* note 202, at 471.

221. Uniform Commercial Code, §§ 2-401, 2-402, 2-403 (1977).

222. Moore, *supra* note 202, at 471 n.34.

difficulties involved in pursuing a civil action,²²³ including the expense and time involved.

An NSPA action may ultimately be more beneficial than a replevin action because the U.S. pays prosecution costs and the criminal sanctions imposed by the statute are a more effective deterrent to illicit trafficking.²²⁴ A suit under the NSPA also spares a foreign nation the uncertainties of bringing a claim in an unfamiliar legal system.²²⁵

5. The Archaeological Resources Protection Act

The United States has its own problem protecting indigenous archaeological objects. As Native American treasures have become more desirable on the market, looting has increased in the culturally-rich areas of the Southwestern U.S.²²⁶ Archaeological materials on United States and Indian lands are protected by the Archaeological Resources Protection Act (ARPA) of 1979.²²⁷ Criminal penalties, similar to those under the NSPA, are available. Despite legislation, it is estimated that 80-90% of all Southwestern U.S. sites have been victims of looting.²²⁸ The destination of Native American artifacts does not include Mexico, but rather market nations, such as Germany, Japan, Scandinavia, or the U.S. itself.

Under ARPA, objects located above and below ground on either public or Indian lands are declared national property. The U.S. legislation is similar to foreign national ownership statutes, with respect to ownership of artifacts not yet discovered.²²⁹ Unlike the comparable Mexican statute, ARPA does not apply to objects discovered on private property. However, the general policy

223. Potential problems include ownership, title, conflicts of laws, proof of foreign law, damages, and statute of limitations. Rogers and Cohen, *supra* note 34, at 322.

224. Moore, *supra* note 202, at 471 n.33.

225. Blass, *supra* note 58, at 1181.

226. Moore, *supra* note 202, at 469.

227. ARPA, *supra* note 26.

228. Goodwin, *Raiders of the Sacred Sites*, N.Y. TIMES, Dec. 7, 1986, at 65, cited in Moore, *supra* note 202, at 469.

229. Moore, *supra* note 202, at 481.

promoted by the Act parallels other source nations' cultural retention concerns.

B. Mexico

To understand Mexico's cultural protection law requires background on the policies and laws of artifact-rich nations. The governments of these countries know that obstacles must be placed on purchasers to diminish the trade in cultural artifacts. As a result, many source countries such as Mexico have enacted umbrella statutes which declare that all antiquities of a certain age or older, whether discovered or still buried, held in public or private hands, are national property.²³⁰ The umbrella laws require that anyone already in possession of artifacts register them with the government. These laws transform the character of antiquities, previously controlled only by export regulations not enforced by the U.S., into stolen property that is subject to U.S. common law and statutory regulations.²³¹

Historically, Mexico has demonstrated a nationalist concern in retention of its bountiful cultural heritage. Since 1897,²³² Mexico has utilized umbrella laws to regulate monuments and works of cultural significance and value. The 1897 statute proclaimed all archaeological monuments within Mexican territory property of the nation.²³³ Movable objects could not be exported without legal

230. *Id.* at 470. The prospective dimension of these laws causes problems since it is difficult to demonstrate that artifacts unearthed after nationalization occurred are owned by the country.

231. The Latin American countries that have umbrella laws include Belize, Costa Rica, Guatemala, Mexico, Nicaragua, Panama, El Salvador, Argentina, Brazil, Bolivia, Chile, and Venezuela. See Note, *Harmonious Meeting: The McClain Decision and the Cultural Property Implementation Act*, 19 CORNELL INT'L L.J. 311, 229 n. 135 (citing specific laws recognized by the U.S.). Other countries that have enacted national ownership laws are Haiti, Egypt, Greece, Iraq, Jordan, Kuwait, Lebanon, Turkey, Algeria, Liberia, Mauritania, Nigeria, Tanzania and Tunisia. Moore, *supra* note 202, at 471, referring to testimony of Ely Mauier, Assistant Legal Adviser, Department of State at the 1985 Senate Hearings, *quoted in* Rosencrance, *supra* note 21, at 334.

232. Ley Sobre Monumentos Arqueológicos, Diario Oficial de 11 de Mayo 1897 (Mex.), *quoted in* Brief for American Association of Dealers in Ancient Oriental and Primitive Art as Amicus Curiae at app. A, U.S. v. McClain, 545 F.2d 988 (5th Cir. 1977) [hereinafter Amicus Brief].

233. Monuments include city ruins, fortifications, palaces, temples, pyramids, sculpted or inscripted rocks, and edifices interesting for the study of Mexican civilization or history. *Id.* art. 2.

authorization.²³⁴ Subsequent legislation increased state control over objects of cultural patrimony.

Mexico's 1930 Law on the Protection and Conservation of Monuments and Natural Beauty provided more expansive legislation to protect cultural artifacts.²³⁵ It labelled both movable and immovable objects as monuments,²³⁶ subject to formal declaration.²³⁷ Rights of individual ownership and alienation of monuments were recognized, subject to the government's right of first refusal.²³⁸ Exportation of movables and immovables that had been declared monuments was prohibited.²³⁹ Objects not within the prohibition, but similar in appearance, were exportable by prior authorization of the Secretariat of Public Education.²⁴⁰ Unique or important specimens discovered through authorized excavations and all objects found through unauthorized means were also classified as national property.²⁴¹

In the Law of 1934, the Mexican legislature further restricted export of cultural artifacts.²⁴² That law declared immovable objects, as well as objects found within immovable archaeological objects, property of the nation.²⁴³ Privately owned movable objects were required to be listed on "The Register of Private Archeological Property," established by the statute.²⁴⁴ Archaeological objects not registered within the statutory period were presumed to originate

234. *Id.* art. 6.

235. *Ley Sobre Protección y Conservación de Monumentos y Bellezas Naturales*, art. 1, 58 *Diario Oficial* 7, 31 de Enero de 1930 (Mex.), *quoted in* Amicus Brief, *supra* note 232, app. A.

236. *Id.* art. 1.

237. *Id.* art. 6.

238. *Id.* art. 16.

239. *Id.* art. 19.

240. *Id.* art. 20.

241. Objects discovered by unauthorized excavation are property of the nation when discovery occurs on lands of either national ownership or subject to federal jurisdiction, whenever the discoverer and landowner are the same or when the landowner has given consent for archaeological examination. *Id.* art. 27.

242. *Ley Sobre Protección y Conservación de Monumentos Arqueológicos e Históricos, Poblaciones Típicas y Lugares de Belleza Natural*, 82 *Diario Oficial* 152, 19 de Enero de 1934 (Mex.), *quoted in* Amicus Brief, *supra* note 232, app. A.

243. *Id.* art. 4.

244. *Id.* art. 9.

from archeological monuments,²⁴⁵ and therefore their export was prohibited.²⁴⁶

The Law of 1970²⁴⁷ maintained export restrictions of prior laws, and retained the register established in the 1934 law.²⁴⁸ Private ownership of artifacts was still recognized,²⁴⁹ and, as in the prior law, immovable archaeological monuments and objects found in them were declared property of the nation.²⁵⁰ If movable objects did not “constitute unique, rare specimens of exceptional value for their aesthetic quality or for their cultural qualities,”²⁵¹ their ownership could be transferred.²⁵² Prior authorization by the Secretariat of Public Education was necessary for permanent export of the object.²⁵³

The statute currently restricting the export of cultural property was passed by the Mexican legislature in 1972.²⁵⁴ Its provisions reflect the steady increase in the control of exports in response to a burgeoning illicit trade and corresponding drain on culturally significant objects. The Act’s most significant provision declares both movable and immovable archaeological monuments the “inalienable and imprescriptible property of the nation,”²⁵⁵ and imposes a complete embargo on export. An exception to the blanket prohibition is archeological monuments exported, by agreement of the President, for exchange or as gifts to foreign governments or for scientific reasons.²⁵⁶ Only movable archaeological monuments may be transported, exhibited, or reproduced with the authorization of the appropriate institute.²⁵⁷ Privately owned historical or artistic

245. *Id.* art. 12.

246. *Id.* art. 23.

247. Ley Federal del Patrimonio Cultural de la Nación, 303 Diario Oficial 8, 16 de Diciembre de 1970 (Mex.), *quoted in* Amicus Brief, *supra* note 232, app. A.

248. *Id.* art. 22.

249. *Id.* art. 17.

250. *Id.* art. 52.

251. *Id.* art. 53.

252. *Id.* art. 54.

253. *Id.*

254. Ley Federal Sobre Monumentos y Zonas Arqueológicas, Artísticas, e Históricas, 312 Diario Oficial 16, 6 de Mayo de 1972 (Mex.), *quoted in* Amicus Brief, *supra* note 226, app. A.

255. *Id.* art. 27.

256. *Id.* art. 16.

257. *Id.* art. 29.

monuments are considerably less restricted; they can be exported either temporarily or permanently if a permit is obtained.²⁵⁸

The 1972 Act retained a registration system,²⁵⁹ and a framework of sanctions was instituted for violations of the Act.²⁶⁰ Article 19 provides that international treaties, federal laws, and Mexican civil and penal codes are applicable to areas not expressly covered by the 1972 law.²⁶¹ The law is not retroactive, therefore rights acquired in conformity with prior law are respected.²⁶²

Mexico's 1972 revision of its antiquities law further encourages development of a black market, by virtue of its blanket prohibition on export of archaeological materials. It has been largely ineffective in preventing the illicit trade in cultural property. The Act only encourages the desirability of Mayan artifacts on the international market and raises their worth, due to their scarcity. As a result, there is a strong financial incentive to engage in cultural property trafficking. Another by-product of the 1972 Act is an overabundance of Mayan artifacts within Mexico in need of protection and preservation. The Mexican government has not been successful in providing the requisite protection or preservation, primarily because of inadequate financial resources. In order to protect its cultural property and prevent theft and illicit trade, Mexico has formed groups on the local level to help educate people about the value of its cultural property in the context of its national heritage. The local groups also try to assist governmental efforts in protecting sites containing cultural property, such as churches and excavated areas.

258. *Id.* art. 16.

259. *Id.* art. 21. Both archeological or historical monuments and declarations of monument zones must be registered.

260. *Id.* ch. VI. Actions subject to sanctions include coming into possession of immovable archaeological objects without authorization; transfer of ownership of movable archaeological monuments; illegally possession of archaeological monuments or historical movable monuments found on an immovable object; damage or destruction to any archaeological, artistic, or historical monument; export of any archeological, artistic, or historical monument without a permit. Fines range from one hundred to fifty thousand pesos, and prison sentences from one to twelve years for the various offenses.

261. *Id.* art. 19.

262. *Id.* Transitory art. 4.

IV. PROSPECTS FOR REGIONAL COOPERATION TO PREVENT
AND PUNISH ILLICIT TRADE IN CULTURAL PROPERTY
USING EUROPEAN INITIATIVES AS MODELS

Due to the international nature of cultural property trafficking, there is clearly a need for both multilateral agreements and enforcement mechanisms. The smuggling of stolen art transcends national boundaries, and involves coordinated criminal activity among several nations. Non-territorial actors have superseded the territorial state²⁶³ in areas such as economics, business, and most importantly for our discussion, criminal activity. The multinational crime syndicate operates by exploiting loopholes in existing national legislation and treaties. For instance, stolen cultural property from southern Mexico can be transported to the U.S. sometimes more easily from Belize than directly from Mexico. Hence, effective cooperation to prevent and prosecute illicit bilateral trade in cultural property between Mexico and the U.S. must include effective regional mechanisms.

Domestic legislation and judicial remedies are inadequate to stem the burgeoning international trade. National processes, by virtue of their status as institutions of limited authority,²⁶⁴ impact on only one facet of the illicit traffic. A market nation like the United States, acting singularly, only has an effect on the capture and return of property once it is has already been illegally excavated and exported. A lesser-developed source nation, like Mexico, often does not independently possess the means to prevent the traffic.

Cooperation in the form of an international regime²⁶⁵ offers a viable method of combatting international criminal networks, as evidenced by co-existing European models. Such models include the Council of Europe, the European Community (EC), the Schengen Accord and the draft Maastricht Treaty, which provide significant

263. Scott Carlson & Bruce Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551, 552 (1991).

264. *Id.*

265. International regimes are defined as rules and procedures, established in order to regulate certain transnational relations and activities which involve government actors and affect non-governmental actors. *Id.* at 554.

new mechanisms for regional cooperation in criminal matters. The following is a discussion of measures enacted by these institutions, their effectiveness, and prospects for a similar regime in the Americas.

A. The Council of Europe Inter-European Convention of 1985

The Council of Europe was formed August 3, 1949.²⁶⁶ The Consultative Assembly and the Council of Ministers comprise the main bodies of the Council.²⁶⁷ The Assembly, consisting of representatives elected by their national parliaments,²⁶⁸ provides a forum of debate and discussion on matters of concern. Its conclusions are forwarded to the Committee of Ministers,²⁶⁹ who may independently consider the matters before it, and determine the means of implementing the objectives of the Council of Europe. Currently, there are twenty-one member states.²⁷⁰

In 1954, the Council of Europe enacted the European Cultural Convention²⁷¹ with the intent of establishing a framework of European cultural cooperation. The Convention declares the concept of a "common cultural heritage,"²⁷² an idea fundamental to the unity of Europe and to further concerted action. The provisions of article 5 create a duty to care for, safeguard, and ensure reasonable access to culturally valuable objects.

266. Statute of the Council of Europe, August 3, 1949, 87 U.N.T.S. 103.

267. *Id.* art. 10.

268. *Id.* art. 25.

269. *Id.* art. 22.

270. Members are Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

271. 3 PROTT & O'KEEFE, *supra* note 98, at 672.

272. European Cultural Convention, Dec. 19, 1954, art. 5, 218 U.N.T.S. 139 [hereinafter Convention of 1954], *cited in* 3 PROTT & O'KEEFE, *supra* note 98, at 673.

1. *The European Convention on the Protection of the Archaeological Heritage of 1969*

The Council for Cultural Cooperation, a standing committee of the Council of Europe, is responsible for the development and security of European cultural heritage. The committee established a working group to draft the European Convention on the Protection of the Archaeological Heritage of 1969,²⁷³ which entered into force in 1970. The Convention's primary emphasis is on archaeological excavations. Member states endeavor to prohibit and prevent illicit excavation,²⁷⁴ and restrict the traffic of archaeological objects suspected of being the fruit of illicit excavation or obtained unlawfully from official excavation.²⁷⁵ Movement of archaeological objects is to be achieved by means of "education, information, vigilance and cooperation."²⁷⁶ However, the restriction against illicit traffic is qualified by the declaration that lawful title or ownership of archaeological objects or their transfer must be respected.²⁷⁷ In this way, the Convention is not unduly burdensome or restrictive.

2. *The European Convention on Offenses Relating to Cultural Property of 1985*

In 1977, the Council of Europe once again directed its attention to the endangered European cultural heritage. A criminal law approach was pursued, involving an agreement among states to internationalize offenses against cultural heritage.²⁷⁸ A Select Committee of Experts on International Cooperation in the Field of Offenses Relating to Works of Art was established in order to draft the European Convention on Offenses Relating to Cultural Property

273. European Convention on the Protection of the Archaeological Heritage, May 6, 1969, 788 U.N.T.S. 227, 8 I.L.M. 736 [hereinafter Convention of 1969].

274. *Id.* art. 3.

275. *Id.* art. 6(2)(c).

276. *Id.*

277. *Id.* art. 8.

278. 3 PROT & O'KEEFE, *supra* note 98, at 679.

of 1985.²⁷⁹ The Committee on Crime Problems approved the Convention in April, 1984 and it was adopted by the Committee of Ministers on January 18, 1985.

As stated in the preamble, the aim of the Council of Europe is to achieve a greater unity between members. The existence of a common cultural heritage, as established in the Cultural Convention of 1954, is a basis of such unity. The member states share a common responsibility in protecting the European heritage from the dangers of crime.

The scope of cultural items and criminal offenses included within the Convention is provided through two Appendices,²⁸⁰ the first listing mandatory and optional objects of cultural heritage²⁸¹ and the second listing mandatory and optional offenses.²⁸² Mandatory offenses and cultural objects are those of which member states are obligated to abide by and carry out. Each member state may declare any of the listed optional objects or offenses to be subject to the obligations of the Convention. Thus, there is freedom to amend the parameters of the Convention.

Parties to the Convention undertake to enhance public awareness,²⁸³ to cooperate in preventive measures,²⁸⁴ and to return cultural property that has been removed from another Party's territory by means of a listed offense.²⁸⁵ Article 7 provides two types of notification regarding discovery and return of cultural property, and the requirement of completeness and full distribution of information included within a notification.²⁸⁶

Articles 8 through 11 provide for the use of letters rogatory as a means of obtaining evidence from other states, and the procedure for their implementation. Each requesting party is required to execute letters rogatory "in the manner provided for by its law." Their use is

279. European Convention on Offenses Relating to Cultural Property, June 23, 1985, 25 I.L.M. 44 [hereinafter Convention of 1985].

280. *Id.* apps. II and III.

281. *Id.* art. 2.

282. *Id.* art. 3.

283. *Id.* art. 4.

284. *Id.* art. 5.

285. Convention of 1969, *supra* note 273, art. 6.

286. *Id.* art. 7.

required for the enforcement of judgments handed down by the requesting party authorities.²⁸⁷ Restitution of property, however, is subject to the conditions provided in the law of the requested party.²⁸⁸ The return of cultural property upon extradition requests shall occur even if extradition can not be carried out,²⁸⁹ and a requested party cannot refuse to return the property by claiming acquired rights through a fiscal or customs offense.²⁹⁰

The Convention of 1985 primarily focuses upon restitution of cultural objects, imposing only minimal obligations upon member states.²⁹¹ Cooperation is the extent of a party's responsibilities, but even that is subject to an exception. Under article 27, a party may decide not to apply restitution provisions should it regard the offense in question as political or prejudicial to its "sovereignty, security, or public order." Further, a state has the right not to apply execution of judgments,²⁹² establishing competence to prosecute an offense,²⁹³ and sentencing reduction in the event of multiple proceedings.²⁹⁴

Although the Convention of 1985 has a narrow scope, it represents an acknowledgement of the continuing problem of cultural property trafficking. The Council of Europe provides a framework upon which agreements and concerted efforts may be developed. In particular, the Council for Cultural Cooperation and the Committee on Crime Problems are two strong permanent institutions within the Council of Europe with competence over the subject matter of cooperation to prevent and punish illicit traffic in cultural artifacts. The agreement by nation states with unique cultural histories, that they share a common cultural heritage, is a significant achievement. The concept vests a shared sense of responsibility in preservation of cultural property, regardless of differences among each nation's treasures. It is conceivable that an international regime, similar in endeavor, could be fashioned out of already existing

287. *Id.* art. 8(3).

288. *Id.* art. 8(2).

289. *Id.* art. 8(4).

290. *Id.* art. 8(5).

291. 3 PROTTE & O'KEEFE, *supra* note 98, at 681.

292. Convention of 1985 *supra* note 279, art. 8(3).

293. *Id.* art. 13.

294. *Id.* art. 18. Convention of 1969, *supra* note 273, art. 28.

intergovernmental organizations in the Americas. As discussed earlier, a prime candidate to function as such a body is the Organization of American States (OAS).²⁹⁵ Through the OAS, the establishment of working groups, information database interface, harmonization of policies, and procedures among the nations of the Americas could be achieved.

B. The European Community

The European Community (EC) is actually comprised of three communities, linked by the Merger Treaty of 1967.²⁹⁶ Prior to that time, the European Coal and Steel Community (ECSC), European Economic Community (EEC), and European Atomic Energy Community (EURATOM) existed contemporaneously but separately.²⁹⁷ At present, there are twelve member states.²⁹⁸

Four institutions comprise the European Community: the Council of Ministers, the Commission, the Parliament, and the Court of Justice. The Commission and the Council work in conjunction with one another to create legislation. The Commission initiates legislative proposals and the Council effectuates enactment, subject to the review and recommendations of Parliament. The Court of Justice interprets and enforces application of EC law.

Initially, the focus on integration within the Community centered on the economic sphere. With the enactment of the Single European Act²⁹⁹ in February 1986, the goal of European unity emerged. Free circulation of goods, services, capital and people through an internal market is to be accomplished by 1992. Following in close proximity are criminals eager to take advantage of the removal of trade barriers and harmonization of export policy.

295. See *supra* notes 98-120 and accompanying text.

296. Treaty Establishing a Single Council and a Single Commission of the European Communities, April 8, 1965, 4 I.L.M. 776 [hereinafter Merger Treaty].

297. Treaty Establishing the European Coal and Steel Community (ECSC Treaty); Treaty Establishing the European Economic Community (EEC Treaty); Treaty Establishing the European Atomic Energy Community (EURATOM Treaty).

298. Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom.

299. Single European Act, Feb. 17-28, 1986, 25 I.L.M. 506.

Before the draft Maastricht Treaty came into being on December 17, 1991, the Single European Act had thus far failed to adequately prepare for the ensuing criminal opportunities. Until Maastricht takes effect, issues of substantive criminal law will not have been directly addressed.³⁰⁰ A system of indirect enforcement still exists, in which prosecution occurs at the national level within a member state.³⁰¹ The result is a wide disparity in diligence of enforcement among the states, often reliant upon that member's available resources.

Articles 30 to 34 of the 1958 Treaty of Rome require the elimination of quantitative restrictions between Member States. However, Article 36 provides that prohibitions or restrictions on imports, exports, or goods in transit can be justified on grounds of public morality, public policy, public security or the protection of national treasures possessing artistic, historic or archaeological value.³⁰² These prohibitions or restrictions cannot constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. The same provision is found in Article 20 of the General Agreement on Tariffs and Trade (GATT).³⁰³ Hence, the Treaty of Rome and GATT recognize that objects of cultural heritage should not be treated the same as other articles of commerce. Free trade in these objects is subject to the overriding goals of the preservation of the objects and the protection of national interests.

Community institutions have made efforts to formulate policy on criminal law issues that relate to trade and the achievement of the goals of the Community. In particular, the EC has debated and taken action in the areas of narcotics, fraud against the EC, insider trading, money laundering, competition and unfair trade, and maritime matters. The EC action on narcotics illustrates the pre-Maastricht focus of the EC on one criminal matter. Parliament established a Committee of Enquiry to investigate narcotics trafficking and

300. Carlson & Zagaris, *supra* note 263, at 558.

301. *Id.*

302. Treaty Establishing the European Economic Community (Treaty of Rome), in force, March 25, 1957, 298 U.N.T.S. 47 (1958).

303. GATT, Final Act, Geneva, 55 U.N.T.S. 194 (1947).

use.³⁰⁴ The Committee issued a report, detailing their findings and identifying legal issues, as a basis upon which to initiate legislative proposals.³⁰⁵ The Committee made five recommendations regarding the central concern of variation in member states' criminal systems: (1) harmonization of member states' laws on the issue of sentencing by adoption of a "community position" on the subject; (2) the adoption of a multilateral agreement on extradition;³⁰⁶ (3) "common legislation" on seizure and freezing of assets; (4) publishing guidelines regarding money laundering and issuing a directive requiring report of currency transactions;³⁰⁷ and (5) the need for establishment of an EC computer database as a depository for relevant information.³⁰⁸

The EC Council of Ministers recognizes the necessity of increased cooperation among member states, and has correspondingly addressed possible reforms. Specifically, the Ministers of Justice met in Brussels in May, 1987 to discuss developments and possible reforms.³⁰⁹ The Commission is also cognizant of the importance of promulgating legislation. As a follow-up to the Parliament's fact finding report, the Commission proposed a program, in November, 1986, to address the European drug problem.³¹⁰ Member states would work together to pinpoint areas in which their cooperation is essential,³¹¹ while internal structural changes are pursued.

It is feasible to adopt measures currently employed in combatting selected criminal offenses in the EC, such as drug trafficking, to a scheme regarding cultural property retention. In the Americas, as free trade and economic integration progress sufficiently, mechanisms to prevent and punish illicit trade in cultural property enforcement

304. Office for Official Publications of the European Communities, Committee of Enquiry into the Drug Problem in the Member States of the Community 12 (1987) [hereinafter *Enquiry*], cited in Carlson & Zagaris, *supra* note 263, at 559.

305. *Id.*

306. *Id.* at 560 (citing *Enquiry* at 45).

307. *Id.* (citing *Enquiry* at 46-47).

308. *Id.* (citing *Enquiry* at 57-58).

309. *Id.* at 561.

310. *Fight Against Drugs in the Community*, BULL. OF EUR. COMM. 8 (1986), cited in *id.* at 561.

311. *Id.* at 562.

would similarly benefit from the proposals suggested by the Committee of Enquiry's report: (1) harmonization of laws in the region, (2) a multilateral extradition agreement, (3) reporting of stolen property or illicit transactions, and (4) the establishment of a central computer database.

These measures could be transferred to a regional Americas organization, dependent upon the level of integration achieved in the future and the existence of a supranational body. Comprehensive measures designed to further unify a group of nations need the structural support of a supranational body. If current negotiations are both successful and a precursor to closer unity, NAFTA may function as a stepping stone to a more comprehensive integration that encompasses tangential, yet significant, issues such as criminal law enforcement cooperation. Like the EC, which began as a strictly economic proposition, NAFTA may spawn a proliferation of integration.

C. The Schengen Accord

In addition to the existing initiatives by the Council of Europe and the EC, several European nations have recently concluded an agreement that addresses criminal cooperation measures. Five EC members signed the Schengen Convention on the Application of the Schengen Accord on June 19, 1990.³¹² Italy has since joined the Accord, and it is anticipated that Spain and Portugal will accede in the near future.³¹³

One of the most significant aspects of the Convention is its strengthening and formalizing of cooperation between police and justice officials.³¹⁴ The signatories agree to simplify extradition

312. Convention to Apply the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Union, The Federal Republic of Germany and the French Republic Relative to the Gradual Abolition of Common Border Controls, *cited in* Bruce Zagaris, *Schengen Convention Points Way to Enhanced EC Criminal Cooperation*, 7 INT'L ENFORCEMENT L. REP. 26 (1991).

313. *Id.*

314. For example, in some instances police officers will be able to pursue criminal suspects up to ten kilometers (6.21 miles) into a neighboring state. *Five EC Members Reach Agreement on Schengen Accord*, 6 INT'L ENFORCEMENT L. REP. 226, 227 (1990).

procedures, exchange information regarding criminal suspects, and tighten controls at and monitor movement across internal borders.³¹⁵ The Convention establishes institutions responsible for managing EC implementation of the agreement, and a working group concerned with enforcement of drug trafficking provisions.³¹⁶ Both procedural aspects of law enforcement and substantive areas are addressed.³¹⁷ The substantive criminal law issues covered by the provisions are uniformity of immigration policy, police cooperation, judicial assistance, extradition, drugs, firearms and ammunition, establishment of a Schengen Information System, and institution of an Executive Committee.³¹⁸

Aspects of the Schengen Convention and Accord may be useful to a regional Americas effort of integration, as models of law enforcement cooperation and harmonized enforcement mechanisms implemented by selected members of an economic integration group. In the future, should the countries of the Americas achieve a free circulation of goods, services, and people, an agreement similar to the Schengen Accord would help law enforcement officials cope with the corresponding increased mobility of criminals and opportunity for illegal acts in the absence of cooperation by the integration organizations themselves.

*D. European Community Agrees to Formally Include Criminal Cooperation within its Economic Integration*³¹⁹

1. Introduction

In a very significant breakthrough for international criminal cooperation and economic integration, the European Community agreed in the Treaty on European Union at Maastricht on December

315. *Id.*

316. *Id.*

317. Zagaris, *supra* note 130, at 26.

318. *Id.* at 27-31.

319. The author is grateful for the assistance of Ursula Scott-Larsen, a paralegal in the employ of Oppenheimer, Wolff & Donnelly, Brussels, for furnishing the relevant provisions of Title VI, *Project de Traité sur l'Union Européenne*, the Maastricht Treaty of European Union, 31 I.L.M. 247 (1992), on which this article is based.

18, 1991, to begin cooperating on international criminal matters.³²⁰ The provisions deepen the cooperation already underway in areas such as narcotics and terrorism (which the Trevi Group³²¹ covers), fraud (which was already under EC control), and immigration and customs (which the Schengen Convention already covered).

2. Scope of Criminal and Enforcement Competencies

The broad substantive criminal and enforcement areas that are within the new competence of the Community have the purpose of achieving the objectives of the European Union. In particular, the EC is taking responsibility over these areas to provide for the free movement of persons. The following nine areas are set forth:

- (1) Judicial cooperation in criminal matters;
- (2) customs cooperation;
- (3) police cooperation to prevent and combat terrorism, unlawful drug trafficking and other serious forms of international crime, including certain aspects of customs cooperation in connection with the organization of a system for exchanging information with a European Police Office (Europol);
- (4) rules governing the crossing of persons of the external borders of the Member States and the exercise of controls on such crossing;
- (5) immigration policy and policy regarding nationals of third countries, including (a) conditions of entry and movement by third country nationals in the territory of a Member State; (b) conditions of residence by nationals of third countries on the territory of a Member States, including family reunion and access to employment; and (c) combatting unauthorized immigration, residence and work by third-country nationals on the territory of a Member State;

320. For the provisions, see Title VI, Provisions on Cooperation in the Spheres of Justice and Home Affairs, *Projet de Traité sur l'Union Européenne* [hereinafter *Traité Union Européenne*], December 18, 1991.

321. The Trevi Group focuses on the fight against terrorism, drug trafficking, and organized crime. The Trevi Group is composed of the ministers responsible for police and public security who started meeting in 1981 and adopted at once a program prepared by the senior officials and relating to exchange of information on terrorism. For additional background, see E. Müller-Rappard, *The European Response to International Terrorism*, *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: PROCEDURAL ASPECTS* 385, 410-11 (M. Cherif Bassiouni ed. 1988).

- (6) rules governing the crossing by persons of the external borders of the Member States and the exercise of controls;
- (7) asylum policy;
- (8) combatting drug addiction insofar as it is not already covered by the international cooperation measures within judicial cooperation in criminal matters, customs cooperation, and police cooperation against unlawful drug trafficking in points (1) to (3) above; and
- (9) combatting fraud on an international scale, insofar as it is not covered already by the international cooperation measures within judicial cooperation in criminal matters, customs cooperation, and police cooperation against unlawful drug trafficking in points (1) to (3) above.³²²

In addition, the same Article calls for judicial cooperation in civil matters, so that some matters that are related, but perhaps not considered criminal or quasi-criminal, are also covered.

3. Defendant's Procedural and Human Rights Safeguards

To safeguard procedural rights of the accused and other persons, the above-mentioned criminal matters within the new competence of the Community must be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Convention relating to the Status of Refugees, especially concerning the protection afforded by Member States to persons persecuted on political grounds.³²³

4. Multiple Forms of Cooperation Facilitated

In matters of newly conferred power, EC members are to inform and consult with one another with a view to coordinating their action. They are to establish collaboration between the relevant departments of their administrations.³²⁴ This means that the relevant officials in,

322. *Projet de Traité sur l'Union Européenne*, art. K.1.

323. *Id.* art. K.2(1).

324. *Id.* art. K.3.

for example, the Ministries of Justice, Home Affairs, Foreign Affairs, and Treasury, must develop regular forms of exchanging information.

Under the Treaty, the Council can undertake the following:

- (1) Adopt joint positions and promote cooperation that contributes to the pursuit of the Union's objectives;
- (2) adopt joint action to the extent to which the objectives of the Union can be attained better by joint action than by the EC members acting individually on account of the scale or effects of the action envisaged, and it can decide that measures implementing joint action are to be adopted by a qualified majority;
- (3) prepare conventions for adoption by EC members pursuant to their respective constitutional rules. Unless otherwise provided such conventions, measures implementing them must be adopted within the Council by a two-thirds majority. The conventions may provide that the Court of Justice will have jurisdiction to interpret their provisions and to rule on disputes concerning their application.³²⁵

These actions may be taken when either any EC member or the EC Commission initiates judicial, customs, or police cooperation,³²⁶ or when any EC member adopts joint positions or joint actions, or prepares conventions for adoption by EC members.³²⁷

5. Establishment of a Coordinating Committee—The Means Towards Permanent and Dynamic Integration

The Treaty establishes a Coordinating Committee composed of senior officials. In addition to its coordinating role, the Committee will have the task of giving opinions to the Council, either at the Council's request or on its own initiative. It will contribute to the preparation of the Council's discussions in all of the eight areas of new criminal competencies.³²⁸

On matters within the new criminal competencies, the European Council must act unanimously, except on matters of procedure and

325. *Id.* art. K.3(2).

326. *See supra* note 322 and accompanying text. The judicial, customs, and police cooperation referred to is outlined in detail in points (1) to (3) in the nine areas set forth in that text.

327. *See supra* note 325 and accompanying text.

328. *Id.* art. K.4(1).

in cases noted in section 3 of this article where the provisions expressly state other voting rules.

The Title also provides that two or more EC members may establish or develop closer cooperation to the extent to which such cooperation does not conflict with, or impede the cooperation provided for in Title VI.³²⁹

6. Cooperation in International Criminal Policy

EC members are required to defend the common EC criminal policy positions within international organizations and at international conferences.³³⁰ Hence, in organizations such as the United Nations, the G-7, Interpol, and the Bank for the International Settlements, the EC members will try to speak with one voice. This will have an important impact on such policies as the recovery and return of cultural property, tax enforcement, customs, immigration, terrorism, money laundering, drugs, organized crime, environmental crimes, and conventions on various procedural matters, such as mutual assistance, extradition, prisoner transfers, transfer of proceedings, and the like.

V. SUMMARY AND PROSPECTS

A. Impact of NAFTA and the Enterprise for Americas Initiative

The North American Free Trade Agreement (NAFTA), which is currently awaiting approval in the United States, Mexico and Canada,³³¹ will undoubtedly have a profound effect upon the movement of goods, services and people. Each nation's leader concluded that the agreement would encourage sustained economic growth, through increased trade and investment, in a market

329. *Id.* art. K.7.

330. *Id.* art. K.5.

331. *See supra* note 15.

comprised of over 360 million people with \$6 trillion in output.³³² NAFTA would also ensure the protection of intellectual property rights, and establish fair and expeditious dispute settlement mechanisms.³³³

Although the negotiations included a broad agenda of issues, such as the environment, narcotics, immigration, human rights and worker standards,³³⁴ the topic of cultural property was not specifically addressed. However, it is foreseeable that the elimination of trade barriers will indirectly impact on the stolen cultural property trade. Because of the increased number of goods and people crossing the borders, customs departments of the member nations will likely find enforcement of existing import regulations to be more difficult. As a general matter, the NAFTA member countries should consider and, where appropriate, strengthen, their national laws and the bilateral and regional conventions which protect the regional cultural heritage by the prevention and punishment of illicit trade in cultural property. A framework instituted for the purpose of the Mutual Assistance in Criminal Matters Treaty³³⁵ could be adapted to the stolen cultural property trade. Specific steps to help prevent trade in illicit cultural property, such as expressly including the prohibition of pre-Columbian property in the U.S. and Canadian tariff schedules, can be taken in the context of NAFTA.

Again, NAFTA does not provide for the recovery and return of stolen cultural property. The only provision which even remotely addresses cultural property is limited to relations between the U.S. and Canada. It provides:

332. U.S. Dept of State Dispatch, North American Free Trade Agreement (Feb. 11, 1991) (Joint Communiqué of United States President George Bush, United Mexican States President Carlos Salinas de Gortari, and Canadian Prime Minister Brian Mulroney, February 5, 1991).

333. Hearing of the Senate Finance Committee, Fed. News. Serv., Feb 6, 1991 (Statement of Ambassador Carla A. Hills, U.S. Trade Representative, before the U.S. Senate Committee on Finance).

334. *Id.* at 9.

335. See, e.g. U.S.-Mexico MLAT, *supra* note 136, art. 2 (2), (3) (providing that the Coordinating Authorities shall consult regularly with each other to secure effective implementation of the Treaty and to anticipate and resolve problems and that they shall meet at the request of either one of them. In addition, art. 18 of the MLAT provides that the contracting parties will meet at least every two years to review the effectiveness of the Treaty's implementation and agree on whatever individual and joint measures are necessary to improve its effectiveness).

Notwithstanding any other provision of this Agreement, as between the United States and Canada, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access—Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed exclusively in accordance with the terms of the Canada-United States Free Trade Agreement. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.³³⁶

NAFTA provisions addressing the protection of intellectual property rights could have an effect in the area of cultural property. In NAFTA, Articles 1714 through 1718 require signatories to ensure that enforcement procedures are available under domestic law to permit effective action to be taken against any infringement of intellectual property rights which the agreement covers, including expeditious remedies to prevent infringements and remedies to deter further infringements.³³⁷ These enforcement procedures are to be applied in order to avoid the creation of barriers to legitimate trade and to provide for safeguards against abuse of the procedures. NAFTA requires the judicial authorities of the signatories to have authority to order prompt and effective provisional measures, and it will exempt public authorities and officials from liability arising from their failure to take appropriate remedial measures only when their actions are taken or intended in good faith in the course of administering their laws.³³⁸ Each signatory must apply criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale,³³⁹ and each must adopt procedures which enable an intellectual property right holder who suspects that importation of counterfeit trademark goods or pirated

336. North American Free Trade Agreement [NAFTA], Annex 2106 (Cultural Industries), available in WESTLAW, NAFTA database.

337. The North American Free Trade Agreement, Sept. 6, 1992, art. 1714: Enforcement of Intellectual Property Rights: General Provisions.

338. *Id.* art. 1716 (Provisional Remedies).

339. *Id.* art. 1717 (Criminal Procedures and Penalties).

copyright goods has occurred, to apply for a block on the release of such goods until the suspected infringement is adjudicated.³⁴⁰

A controversy which emerged in the wake of the NAFTA negotiations demonstrates the overlap of the protection of intellectual property rights and cultural property, and it hints at Mexico's possible stance on NAFTA provisions. The incident which precipitated the controversy revolved around an effort on the part of the Mexican government to block an American-led archaeologic investigation of some important ruins in southeastern Mexico. An American archaeologist, Jeffrey K. Wilkerson, wanted to conduct research at a major site in the state of Veracruz. On July 31, 1992, the Mexican government rejected Wilkerson's request and then, on August 7, announced it would undertake its own investigation at the site, using criteria similar to those in Wilkerson's proposal.

U.S. scholars quickly charged that Mexico had improperly appropriated Wilkerson's research. The Mexican government denied the charge but warned that it would no longer recognize the confidentiality of scientific data such as that collected by foreign archaeologists in Mexico. Such data must be reported to the Mexican government under government regulations, and the government may circulate the data as it deems appropriate. U.S. persons claimed that the circulation by the Mexican government of the Wilkerson data appeared to contradict existing intellectual property laws, as well as provisions of the proposed NAFTA. On September 5, Mari Carmen Serra Puche, president of the government's Council of Archaeology, stated that the proposal would be approved by the government in its original form, without modification.³⁴¹

As NAFTA reflects a willingness on the part of Mexico and the United States to bind their economic futures together, the Enterprise for Americas Initiative (EAI) is a similar effort among governments in the region to achieve broad-based trade and investment liberalization, as well as economic integration. Although the precise mechanisms of the Initiative are still undergoing formation, the goal

340. *Id.* art. 1718 (Enforcement of Intellectual Property Rights at the Border).

341. For additional background on the incident, see Ted Robberson, *Mexico Lifts Bar Against U.S. Study*, WASH. POST, Sept. 6, 1992, at A34.

of the Initiative—economic integration throughout the region—is exemplified in other free trade initiatives: MERCOSUR, in which Argentina, Brazil and Uruguay are members; the Group of Three, in which Colombia, Mexico and Venezuela are members; and other continuing initiatives, such as the Caribbean Common Market and Community, the Andean Common Market, and the Central American Common Market. Could NAFTA and efforts undertaken within the Enterprise for Americas Initiative be the beginning of a trend toward regional cooperation in other areas, such as enforcement? Strong regional law enforcement, cooperative mechanisms, and a structural framework will become critical as economic integration advances and opportunities for transnational criminal activity increase.

Unfortunately, the EAI does not provide for enforcement. The absence of such a provision can be primarily attributed to the fact that the EAI was a very short statement of intent to promote trade and investment in this region. It is not a comprehensive plan, even for the goal of economic integration. Most similar integration initiatives, such as the Treaty of Rome,³⁴² have only limited enforcement goals. Enforcement mechanisms tend to grow as economic integration gains momentum.

As the goals of NAFTA and the EAI are realized, the establishment of a comprehensive law enforcement system and in particular, a regime to prevent and punish the illicit traffic in cultural property, becomes a natural imperative. As the liberalized trade and economic integration efforts in the Americas progress, governments, professionals, and academicians should conceptualize, propose, and debate the design and implementation of regional enforcement mechanisms, so that the organized criminal groups are not able to traffic in cultural property, and so a regional enforcement regime is properly established. The institutions and mechanisms within both the Council of Europe and the EC provide examples for nation-states in the Americas to emulate in prioritizing, preventing, and punishing the illicit movement of cultural property.

342. See, e.g., *Projet de Traité sur l'Union Européenne*, *supra* note 322, art. K.1.

1992 / Recovery and Return of Stolen Cultural Property

B. Enforcement in Reality—Successes and Difficulties

The current legal framework between the United States and Mexico provides a foundation upon which to combat the trade in stolen cultural property. Both nations have shown a commitment to retain national patrimony. However, the agreements and cooperation between the two nations have, if anything, only curtailed a portion of the illegal export and import of cultural objects. In the face of Mexico's national treasury law, the strong incentive to engage in illegal excavation and export remains. The risks involved may be more clearly defined for the criminal, but the rewards are also greater; a virtual blanket prohibition on export of pre-Columbian archaeological objects makes such items a rare and expensive find on the market.

A major problem is that successful prosecution by Mexico of an action in the United States to recover stolen cultural property requires proof that the object entered the U.S. after 1972. It is difficult to determine, much less prove in court, when an item was illegally excavated and when it entered the U.S. if the item has never been documented while *in situ*. The burden of proving these facts is on a claimant, such as the Mexican government. Another problem concerns protecting the archeological sites. There are 15,000 documented and registered archeological sites, but many more exist and deserve protection. Some art law experts believe that Mexico should realize the deficiencies of its present approach to cultural property: its strict prohibitory law does not work; the focus of its law must shift to a more flexible export policy; a commitment to legitimate cultural exchange is in its best interest; and the most promising means of securing its cultural heritage is through regional cooperation.³⁴³ The U.S. and Mexico must make a stronger effort to foster regional initiatives, including the prevention of illicit trade in cultural property. Neither the U.S. nor Mexico are signatories to

343. Some examples are the San Salvador Convention, the European Convention on Offenses Relating to Cultural Property of 1985, and the European Convention on the Protection of the Archeological Heritage of 1969. The most likely framework would be to convene a group of experts under the auspices of the OAS to review the San Salvador Convention and identify means of strengthening regional cooperation on cultural property in the Americas.

the San Salvador Convention, and although they are both parties to the UNESCO Convention, they do not fully comply with its provisions.³⁴⁴ Among the possible mechanisms for regional cooperation are the establishment of a center for the distribution of informational programs, resources, and experts from the different countries and the exchange of information concerning persons with looting and trafficking records.

Another factor to consider in any effort at implementing a system to protect a region's cultural heritage is the connection between the looting of cultural property and the need for development. An awareness of this linkage could prompt more innovative methods to assist developing countries in protecting their cultural heritage. Under the current regime of protection, some art law experts believe that Mexico's 1972 Cultural Property Law undermines UNESCO's mandate of legitimate cultural exchange,³⁴⁵ while the U.S.'s reservations to and understanding of the Convention belie its selective commitment to UNESCO's goals. A future regime should be able to strike a better balance between the desire of art-poor but economically developed nations for cultural exchange, and the need of art-rich nations lacking in economic potency for increased development, in a way which decreases the looting of cultural resources, while advancing UNESCO's goals.

As the U.S. and Mexico come to terms with the increasing importance of mutual cooperation, as their likely accession to NAFTA evidences, they must venture to resolve other issues of concern. One of the more prominent issues, the problem of illicit movement of cultural property, can only be resolved by the continued enforcement of existing treaties, the development of stronger initiatives, and the imposition of enforcement mechanisms through new and existing regional institutions. The conclusion of NAFTA breeds cautious optimism that the U.S. and Mexico will in the future develop the means necessary to combat the illicit trade in cultural property.

344. See *supra* notes 73-97 and accompanying text.

345. Merryman, *supra* note 2, at 848-49.